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THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. VI.

TRINITY VACATION, 24 VICT., TO EASTER VACATION, 24 VICT.,
BOTH INCLUSIVE.

BY

E. T. HURLSTONE, OF THE INNER TEMPLE,

AND

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ESQUIRES, BARRISTERS-AT-LAW.

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J U D G E S
OF THE
COURT OF EXCHEQUER,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

Sir SAMUEL MARTIN, Knt.

Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.

Sir WILLIAM FRY CHANNELL, Knt.

Sir JAMES PLAISTED WILDE, Knt.

ATTORNEY-GENERAL.

Sir RICHARD BETHELL, Knt.

SOLICITOR-GENERAL.

Sir WILLIAM ATHERTON, Knt.

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ERRATUM.

Page 289, line 6 from the top. *for* "exclude," *read* "include."

Exchequer Reports.

REGULÆ GENERALES, 24 VICT.

COURT OF EXCHEQUER.

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REVENUE SIDE.

In pursuance of the provisions contained in the 26th Section of the 22d and 23d Victoria, Chapter 21, intituled "An Act to regulate the Office of Queen's Remembrancer, and to amend the Practice and Procedure on the Revenue Side of the Court of Exchequer," It is Ordered that the following Rules in respect of the matters hereafter mentioned shall be in force on the Revenue Side of the Court of Exchequer.

GENERAL RULE AS TO ISSUING WRITS.

1. All writs to be hereafter sued out by the solicitor of any department, or by any attorney, shall be prepared by the solicitor of such department, or by the attorney suing out the same, and the name of such solicitor or the name and address of such attorney, together with the name of the department (if any) on behalf of which the writ is sued out, shall be endorsed thereon; and every such writ shall, before the issuing thereof, be sealed at the Queen's Remembrancer's office, and a præcipe thereof left at the said office; and thereupon an entry of every such writ, together with the date of sealing, and the name of the solicitor or attorney suing out the same shall be made in a book, to be kept at the Queen's Remembrancer's office for that purpose; and all writs of whatever description to be hereafter issued from the said Queen's Remembrancer's office shall be tested of the day, month, and year when issued; but in case any writ or writs of extent or

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diem clausit extremum shall issue within twenty-one days from the date of the fiat, the same may bear teste the date of the fiat, *provided* that this rule is not to affect the right of the Crown applying to the Court, or a Judge, for a writ of extent or diem clausit extremum tested the date of the fiat, nor to affect commissions for enclosing waste land in any of the Royal forests, process against parishes or collectors under the 5th and 6th Will. 4. c. 20, s. 11, or commissions for taking the bond of a public officer, which may be issued as at present.

SUBPŒNA AD RESPONDENDUM.

The proceeding by subpœna ad respondendum may be thus :—

2. The writ of subpœna may be either in Form 1, 2, or 3, Schedule A., according to the circumstances, and shall be in force six calendar months from the date thereof; and at any time during six months from the issuing or renewing, as hereinafter mentioned, of the original writ of subpœna, one or more concurrent writ or writs may issue, each concurrent writ to bear teste of the same day as the original writ, and to be sealed and marked "concurrent," and the date of issuing the concurrent writ; and such concurrent writ or writs shall only be in force for the period during which the original writ of subpœna shall be in force; but if any defendant therein named may not have been served therewith, the original or concurrent writ of subpœna may be renewed at any time before its expiration for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being sealed and marked of the day, month and year of such renewal; and a writ of subpœna so renewed shall remain in force, and be available to prevent the operation of any statute whereby the time for the commencement of the suit may be limited, and for all other purposes, from the date of the issuing of the original writ of subpœna.

3. In order to proceed to judgment under the following rules the service of the writ shall, where practicable, be personal; but the order of a Judge may be obtained under special circumstances, on affidavit, to dispense with personal service, and to proceed as is the practice on the Common Law side of the Court.

4. The appearance to be in fourteen days from day of service, inclusive of the day of service.

5. If defendant does not appear according to the exigency of the writ, judgment may be signed on filing an information (if not previously filed) and an affidavit of service, or the order to proceed, and in all cases where the claim is in respect of a debt, penalty or liquidated demand in money, execution may issue in fourteen days from the day of signing judgment.

6. If defendant appears in due time, a copy of the information must be delivered to the defendant, or his attorney, in case he appears by attorney, and notice given (either on the information or sepa-

rately) to plead in fourteen days from the day of service of such notice, otherwise judgment.

7. The defendant may appear at any time before judgment actually signed; but if he does so after the ordinary time for appearance, he or his attorney must in such case forthwith give notice to the solicitor of the department or the attorney issuing the writ, that he has appeared.

8. If defendant appears after the time for appearance and before information filed, a copy of the information is to be delivered with notice to plead as before mentioned. And if defendant appears after the information has been filed, and before judgment signed, notice is to be given to him or to his attorney, at the office of the Queen's Remembrancer, of the day when the information was filed, and he may obtain an office copy thereof on payment for the same, and he must plead thereto within four days from the date of his appearance, otherwise judgment may be signed against him.

9. When a defendant appears in person the delivery of all rules, notices and other proceedings, may be made at the address given by him on entering his appearance.

CAPIAS.

10. The writ of capias may be in Form 4, Schedule A., and shall be in force six calendar months from the date thereof, but the same may be renewed from time to time for a like period, at any time within the original period of six months, or within the renewed period by resealing the writ at the Queen's Remembrancer's office.

11. The appearance is to be entered, and bail piece filed in fourteen days after the execution of the writ, inclusive of the day of execution.

12. If the defendant, having given bail to the sheriff, does not appear according to the exigency of the writ and also file his bail piece, judgment may be signed on filing an information (if not previously filed) and the sheriff's return, and execution may issue in fourteen days from the day of signing judgment.

13. If defendant appears in due time and files his special bail, a copy of the information must be delivered to the defendant, or his attorney, in case he appears by attorney, and notice may be given (either on the information or separately) to plead in fourteen days from the day of service of such notice, otherwise judgment. The defendant may appear and file his bail at any time before judgment actually signed, but if he does so after the ordinary time for appearance and filing his bail, he or his attorney must in such cases forthwith give notice to the solicitor of the department issuing the writ that he has done so.

14. If the defendant appears and files his bail after the time for appearance and before information filed, a copy of the information is to be delivered, with notice to plead as before mentioned; and if

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16 & 17 Vict.
 c. 107, s. 295.

defendant appears and files his bail after the information has been filed, and before judgment signed, notice is to be given to him or to his attorney, at the office of the Queen's Remembrancer, of the day when the information was filed: and he may obtain an office copy thereof, on payment for the same, and he must plead thereto within four days from the date of his appearance and filing his bail, otherwise judgment may be signed against him.

15. In any case if a defendant be in custody for want of bail he may be served with a copy of the information filed against him, personally, or by delivery of a copy of the information to the gaoler, keeper, or turnkey of the prison, and in default of such defendant appearing and pleading to such information for twenty days from the date of such service, judgment may be entered by default and execution issue forthwith.

16. In any case where a party is in gaol and is to be served with a copy of the information, the copy is to be made by the solicitor of the department, but before service the information is to be filed at the Queen's Remembrancer's office.

Provided that nothing in these rules shall affect the right to take an assignment of the bail bond.

17. If a defendant be arrested and gives bail to the sheriff for his appearance, before entering such appearance the defendant shall give a notice containing the names and addresses of his bail to the solicitor of the department out of which the capias issued, and which notice shall be left with such solicitor four clear days before application shall be made for the notice to be returned.

18. Should the bail be approved, a bail piece containing the name of defendant and his bail, with their respective addresses and occupations, is to be made out on parchment by defendant or his attorney, and, acknowledged, the leave of a Judge must be obtained, if more than two names of bail are inserted in the bail piece. The bail piece, if acknowledged in town, must be before a Judge or Special Commissioner, and, after acknowledgment, filed, together with the Crown's approval of bail, in the Queen's Remembrancer's office; if acknowledged in the country, it must be before a Commissioner duly authorized to take special bail in the Exchequer; in the latter case, after acknowledgment an affidavit of caption must be made, which together with the bail piece, and Crown's approval of bail, must also be filed in the Queen's Remembrancer's office; and, at the time of filing his bail, defendant must also enter his appearance and give notice to the solicitor of the department that he has done so, if bail not perfected and appearance entered in due time; if the bail is refused, the parties shall be at liberty to justify before a Judge, or by order of a Judge before the Queen's Remembrancer, upon giving two clear days' notice of their intention to do so to the solicitor of the department who issued the writ of capias, or, the defendant may submit the names of other bail for the solicitor's approval.

19. If defendant requires further time for appearance or perfecting bail, the same may be obtained by summons and order of a Judge.

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20. By the order of a Judge the defendant may render to the county goal where arrested, but notice of the application must be given to the solicitor of the department; and if order made and defendant renders to such county gaol, a copy of such order must be left with the gaoler and also at the Queen's Remembrancer's office, but defendant may render to the Queen's prison as at present, on giving notice to the Queen's Remembrancer, who is to prepare a transcript of the bail, and attend with the same and original bail piece before a Judge at the time of defendant rendering. If defendant only puts in bail for the purpose of rendering, the bail piece and transcript are to be prepared by the defendant, and, after acknowledgment, the bail piece is to be filed at the Queen's Remembrancer's office.

For Form of Bail pieces, see Schedule C., Forms 10 and 11.

INTRUSION.

21. In order to assimilate the mode of procedure in intrusion to that in ejectment and trespass on the Common Law side of the Court as nearly as may be, consistently with the rights and prerogatives of the Crown and the provisions of the statute 21 Jac. 1, c. 14, the mode of procedure, to remove persons intruding upon the Queen's possession of lands or premises, shall be separate and distinct from that to recover profits or damages for intrusion.

22. In proceeding by writ of subpœna for intrusion to remove persons intruding upon the Queen's possession of lands or premises, the writ may be directed to the persons intruding by name, and to all persons entitled to defend the possession of the property claimed, and the property intruded upon shall be described in the endorsement on the writ with reasonable certainty. For form of writ see Schedule A., No. 2.

23. The writ shall command the persons to whom it is directed to appear within 14 days after service thereof in the Court of Exchequer to defend themselves in respect of the property alleged to be intruded upon, or such part thereof as they may think fit, and it shall also contain a notice that in default of appearance they will be removed from the premises.

24. The writ may be served in like manner as other writs of subpœna, or in such manner as a Court or Judge shall order: and in case of there being no person actually resident upon or in the actual occupation of the property, such writ may be served by affixing a copy thereof upon the door of any dwelling house, or upon any other conspicuous part of the premises.

25. The persons named as defendants in such writ, or either of them, shall be allowed to appear within the time appointed.

26. Any other person not named in such writ shall, by leave of the

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Court or a Judge, be allowed to appear and defend on filing an affidavit shewing that he is taking the profits either by himself or his tenant of the land, &c.

27. Any person appearing to defend as landlord in respect of property whereof he alleges himself to be taking the profits only by his tenant, shall state in his appearance that he appears as landlord.

28. Any person appearing to such writ shall be at liberty to limit his defence to a part only of the property mentioned in the endorsement on the writ, describing that part with reasonable certainty in a notice intituled "In the Exchequer, and cause," and signed by the party appearing or his attorney: such notice to be served within four days after appearance upon the solicitor whose name is endorsed on the writ, and an appearance without such notice confining the defence to part shall be deemed an appearance to defend for the whole.

29. No judgment for want of appearance to remove persons intruding shall be signed without first filing an affidavit of the service of the writ and a copy thereof and the information, or, where personal service has not been effected, without first obtaining a Judge's order or a rule of Court authorizing the signing such judgment, which said rule or order, or a duplicate thereof, shall be filed, together with a copy of the writ and the information.

30. Where a person not named in the writ of subpoena, in such cases, has obtained leave of the Court or a Judge to appear and defend, he shall forthwith enter an appearance entitled in the suit, against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the solicitor of the department whose name is endorsed on back of the writ, and shall plead to the information and be subject to all the like rules of pleading and practice in respect thereof as if he had originally been named a defendant in the writ.

31. The Court or a Judge may strike out or confine appearances and defences, set up by persons not taking the profit of the land, &c. by themselves or their tenants.

32. In case no appearance shall be entered within the time appointed, or if an appearance be entered, but the defence be limited to part only, the Crown shall be at liberty to proceed with respect to the undefended part of the claim, and may sign judgment and issue execution for the removal of the defendant from the land or the part whereof to which the defence does not apply, as mentioned in Rule No. 5.

33. The fact of intrusion by the defendant shall not be at issue between the parties on the trial, and in cases in which the defendant may plead the general issue under the provisions of the statute 21 Jac. 1, c. 14, a plea denying the right of actual possession of the land and premises claimed to be in the Crown shall (except as to the putting in issue the fact of the intrusion) have the like force and effect as a plea of the general issue would have had before these Rules.

34. If the defendant does not appear at the trial of the cause, the defendant shall be taken to have admitted the Crown's title, and the fact of the intrusion, and the verdict shall be entered for the Crown without producing any evidence, and the Crown shall have judgment for costs of suit.

35. The judgment for the Crown in cases of intrusion for the removal of persons intruding shall be a judgment of amoveas and capiatur pro fine, if a fine be sought to be recovered.

36. In case of judgment by default in intrusion, for the removal of persons intruding, either for non-appearance, or for want of pleading, no costs are to be allowed.

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INTRUSION FOR RECOVERY OF PROFITS OR DAMAGES.

37. In proceeding by writ of subpoena for intrusion on the Queen's possessions and taking profits or for damages, the writ shall be directed to the persons intruding by name, and may be in Form 3, Schedule A.

38. To an information of intrusion for taking profits or for damages the defendant may plead the general issue of non intrusit, or not guilty, subject to the provisions of the statute 21 Jac. 1, c. 14, and the judgment by default will be interlocutory, subject to the provisions of Rule 92; the final judgment for the Crown will be in either case, that the Crown do recover damages and costs, with a capiatur pro fine, if necessary.

SERVING A CORPORATE BODY.

39. The service of a writ of subpoena ad respondendum, or scire facias, issued from the Revenue side of this Court against a corporation aggregate, may be served in like manner as a writ of summons issued against a corporation aggregate under the sixteenth section of the Common Law Procedure Act, 1852, and the like proceedings to judgment may take place thereon, as against any other party.

INFORMATIONS.

40. In all cases the information when filed is to be on parchment, and (if not filed before) is to be filed when judgment is signed, and on the information is to be endorsed the day the process issued applicable to such information by the solicitor of the department or by the attorney filing the same; but in any case, if judgment be entered for the defendant, and the information be not filed, the copy delivered to the defendant may be filed in lieu of the original information.

41. All informations shall be delivered or filed, as the case may be, within twelve calendar months after the service or execution of the process for the purpose for which the same issued, and, if not, the Crown shall, unless otherwise ordered by the Court, or a Judge, be deemed out of Court; but in any case where a defendant shall be in custody either on capias or attachment for not appearing, the information, if not before filed, shall be filed, and service thereof made within

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six weeks after defendant shall have been arrested, otherwise defendant shall be at liberty to apply to a Judge for his discharge, but notice of such application must be given to the solicitor of the department issuing the writ.

SCIRE FACIAS.

The proceedings by scire facias may be thus :—

42. The writ of scire facias may be in forms 5, 6, 7, 8, or 9, in Schedule A., as the case may be, and shall be in force six calendar months from the date thereof, but may be renewed as in cases of subpena ad respondendum. The service thereof, where practicable, shall be personal, but the order of a Judge may be obtained under special circumstances, on affidavit, to dispense with personal service, and to proceed as on the Common Law side of the Court upon writ of summons.

43. The appearance to be entered in fourteen days from the day of service, inclusive of the day of service.

44. If defendant appears to the writ of scire facias in due time, he must plead thereto within fourteen days after appearance entered, otherwise judgment.

45. If defendant does not appear according to the exigency of the writ, on filing the said writ, and an affidavit of service, or the order of the Judge to proceed, judgment may be signed and execution issued in fourteen days from the day of signing such judgment.

46. The defendant may appear at any time before judgment actually signed, but if he does so after the ordinary time for appearance, he, or his attorney, in case he appears by attorney, must in such cases give notice to the solicitor of the department issuing the writ, that he has done so, and plead to the writ within four days from the date of his appearance.

47. The scire facias in all cases is to be filed, before judgment signed.

EXTENTS (OTHER THAN THOSE ON ESTREATS).

48. The obtaining of the writ of extent or diem clausit extremum in any case shall be the same as is now in practice subject to Rule No. 1, but when an extent or diem clausit extremum is returned into the office to be filed, eight days after the same has been filed, if the return has expired, if not within eight days after the same shall have expired, the Crown, without giving a rule to claim, may proceed to realize the property mentioned in the inquisition, or recover any debt, or apply for an order for the sale of any real estate mentioned therein, or for an order to have paid to the Crown any money mentioned in the sheriff's return; but if any debt is returned as owing to the Crown's debtor, and there is danger of its being lost, an extent on an affidavit and fiat may immediately issue for its recovery without waiting such eight days.

49. Where a claim is entered to any property, real or personal, or debts seized, under a writ of extent or diem clausit extremum, or money mentioned in the sheriff's return, notice shall be given by the claimant, or his attorney, to the solicitor of the department, and such claimant, or his attorney, may obtain a copy of the extent or diem clausit extremum and inquisition at the office (which copy may commence as in Form 1, Schedule C.), and the solicitor of the department may on such claim being entered serve a notice requiring the defendant to plead in fourteen days from the service thereof, otherwise judgment; if time should be required for pleading, the same may be granted by order of a Judge.

50. The pleadings in such cases are to be delivered as in other cases.

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WRITS OF APPRAISEMENT, RECOVERIES, AND WRITS OF DELIVERY,
ALSO CLAIMS ON INDENTURES.

51. After the execution of any writ of appraisement, the solicitor of the department is to file the same in the Queen's Remembrancer's office, with an indenture annexed thereto, together with an information of seizure which is to be prepared by such solicitor; and if no claim be entered for eight days after the same shall be filed, if the return of the writ of appraisement has expired (if not, eight days after the return has expired), a judgment of recovery may be entered and a writ of delivery issue for the disposal of the property mentioned in the indenture without any rule to claim.

52. Should a claim be entered, the same shall be entered at the Queen's Remembrancer's office, on leaving a præcipe for that purpose; the claimant shall have eight days after entering such claim to make the affidavit of property and enter into a recognizance for costs (which recognizance shall be on parchment and is only necessary in the Inland Revenue Department), the sureties to which shall be subject to the approval of the solicitor of Inland Revenue, and the parties to such recognizance shall be the claimant (or his attorney), together with the sureties so approved of. After such claim shall have been entered, affidavit made, and recognizance, where necessary, filed, a copy of the information for the recovery of the property shall be delivered to the claimant, or his attorney, with a notice endorsed thereon or annexed thereto, requiring him to plead in fourteen days, otherwise judgment. If claimant pleads the like proceedings shall take place as in other informations. The writ of appraisement, indenture, and proclamations need not form part of the record of nisi prius. If after claim entered no affidavit of property shall have been made, or recognizance, where necessary, filed, within the period above named, judgment may be signed as though there had been no claim entered.

53. The affidavit of property is to be prepared in the office and

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copied on the indenture, but the recognizance is to be prepared by the attorney of the claimant.

For Form of Recognizance, see Schedule C., Form 12.

TRANSCRIPT OF ESCHEATS, AND OUTLAWRIES.

54. Eight days after the filing of the transcript of any writ of escheat or *capias utlagatum* with the inquisition annexed, if the return of such writ has expired, if not, eight days after such return, the Crown or prosecutor, as the case may be, shall be at liberty to realize the value of the goods and chattels, or to issue a writ of *levari facias* to levy the rents, or a writ of *scire facias* for the recovery of any debt, or such other writ as may be applicable to the premises mentioned in such transcript, but such transcript need not be enrolled; in case of outlawries, the present practice as to petitioning the Lords of the Treasury to authorize the Attorney General to consent that the money received by the sheriff, under any writ where the same exceeds fifty pounds, may be paid to the prosecutor, and the application to the Court, or a Judge, for that purpose shall continue as heretofore.

55. Where a claim shall be entered to any property seized under a writ of escheat or *capias utlagatum*, and the transcript is filed in the Queen's Remembrancer's office, the claimant, or his attorney, is to give notice to the solicitor for the Crown or to the attorney for the prosecutor of such claim being entered, and thereupon the claimant, or his attorney, may obtain from the office a copy of the transcript, or so much thereof as shall be necessary, and which copy may commence in Form (2) in the Schedule (C.) hereunto annexed, and upon such claim being entered the solicitor for the Crown or attorney for the prosecutor may deliver to the defendant (claimant) or his attorney a notice requiring him to plead in fourteen days from the service of such notice, otherwise judgment; but if time to plead be required, the same may be granted by order of a Judge.

56. Subsequent pleadings to be delivered as in other cases.

57. If defendant outlawed be a beneficed clergyman, a sequestration may issue on an order obtained for that purpose, as is at present the practice.

TIME FOR PLEADING, &c.

58. The plea and subsequent pleadings in all cases are to be delivered between the respective parties.

59. Unless otherwise ordered by the Court or a Judge, the time for pleading shall be fourteen days from the service of the notice to plead, and a notice requiring the defendant to plead in fourteen days, otherwise judgment, may be endorsed on the information or other proceeding required to be pleaded to or delivered separately; and the time for replying and pleading all subsequent pleadings shall be

fourteen days from the service of the notice to reply, &c., and a like notice to that effect may be endorsed on the pleading or delivered separately, but time may be obtained by order of a Judge. On default, after such notice, judgment may be signed.

60. If the opposite party doth not appear on a summons for time, and consent to or oppose the summons, the party applying for time may obtain a subsequent rule or rules for any time not exceeding three weeks on each rule from the Queen's Remembrancer's office, to be dated the day it is issued; and such rule may from time to time be issued to either party, unless a two days' notice is given to the opposite party that the application for further time is objected to, and in such case the application for further time must be made to the Court or a Judge.

61. The pleadings and proceedings in Revenue may be had and taken throughout the year, without reference to any seal day, provided that, in all cases in which any particular number of days not expressed to be clear days is prescribed by the rules or practice of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

62. The days between Thursday next before and the Wednesday next after Easter Day and Christmas Day, and the three following days, shall not be reckoned or included in any rules, notices, or other proceedings, except notices of trial. Informations may be delivered or served on any day except Sundays, Christmas Day, Good Friday, or any day appointed for a public fast or thanksgiving.

63. In case the time for pleading to any information, or for answering any pleadings, shall not have expired before the 10th day of August in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose, after the 24th day of October, as if the information or preceding pleading had been delivered or filed on the 24th October. This rule is not to apply when a defendant is in gaol under a *capias* for penalties, or under an attachment, and is afterwards served with copy of the information.

64. Every information and other pleading shall be entitled "In the Exchequer," and of the day, month, and year when the same was filed or delivered, as the case may be, and shall bear no other time or date, and every information and other pleading shall also be entered on the record made up for trial (and on the judgment roll if necessary) under the date of the day, month, and year when the same respectively took place, and without reference to any other time or date, unless otherwise ordered by the Court or a Judge.

65. In cases of claim under extent or transcript of escheat or outlawry or appearance to *scire facias* the proceedings may commence in the words set forth in the Schedule C., Forms 1, 2, and 3, hereto annexed, under their respective heads, or as near thereto as may be.

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66. No entry of continuances by way of imparlance, curia advisare vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings.

67. If no proceeding has been had for one year from the last proceeding had the party who desires to proceed shall give a calendar month's notice to the other of his intention to proceed; a summons of a Judge, if no order be made thereupon shall not be deemed a proceeding within this Rule, a rule for time to plead, &c., and a notice of trial, although afterwards countermanded, shall be deemed a proceeding.

RECOGNIZANCES.

68. All recognizances, if taken and acknowledged in town, are to be taken and acknowledged before a Judge; and if a recognizance be taken and acknowledged in the country, the same may be taken and acknowledged before a Commissioner for taking special bail in the Exchequer, and in the latter case an affidavit of caption must be made and filed.

69. No commission in future need issue for taking recognizance or bail in the country, provided that, where necessary, in the case of a bond given by a public officer, such commission may issue as heretofore.

70. Where a recognizance is ordered by the Privy Council to be entered into, the same, after the acknowledgment thereof, is to be filed in the Queen's Remembrancer's Office; and thereupon the Queen's Remembrancer is to grant a certificate of such recognizance being filed.

71. No enrolment of any recognizances shall be necessary, but the same are to be filed in the office.

72. All recognizances and bails are to be prepared on parchment by the respective parties entering into the same, excepting when, in the case of a bond by a public officer, the Queen's Remembrancer shall be directed by the Treasury to prepare the same.

For Forms of Recognizances, see Schedule C., Forms 12 and 13.

ISSUE.

73. No copy issue need be delivered, and the record of nisi prius in all cases is to be made up and entered with the associate by the solicitor of the Crown, but need not be sealed.

See Forms of Nisi Prius Record, Schedule C., Forms 1, 2, 3, and 4.

NOTICE OF TRIAL AND COUNTERMAND.

74. The notice of trial shall be 10 days in all cases, and countermand of notice of trial four days before the time mentioned in the notice of trial, unless short notice of trial has been given, when two days shall be sufficient.

The associate in all cases at nisi prius is to take the verdict.

JURY PROCESS, JURIES, AND VIEW.

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75. That sections 104 to 115, both inclusive, of the Common Law Procedure Act, 1852, together with the rules 44 to 49, both inclusive, of Hilary Term, 1853, where applicable, shall extend and be adapted and applied to suits on the Revenue side of the Court.

AS TO ADMISSION OF DOCUMENTS.

76. The several provisions and enactments of the sections 117, 118, and 119 of the Common Law Procedure Act, 1852, together with rules 29 and 30 of Hilary Term, 1853, shall, so far as they may be applicable, extend and apply to cases on the Revenue side of the Court.

77. No subpoena for the production of an original record shall be issued unless a rule of Court or the order of a Judge shall be produced to the officer issuing the same, and filed with him, and unless the writ shall be made conformable to the description of the document in such rule or order.

78. All depositions of witnesses taken under the order of a Judge, Rule of Court, or Writ of Commission shall be returned to and filed in the Queen's Remembrancer's office.

WITHDRAWAL OF PLEA, AND CONFESSION.

79. A defendant may, at any time before trial, withdraw his plea by delivering such withdrawal to the solicitor of the department, after which the Crown may immediately enter judgment, and issue process thereupon. When the Crown signs judgment, in addition to filing the information, the withdrawal of the plea must also be filed.

80. Where defendant confesses the information or scire facias, such confession, as well as the information or scire facias, is to be filed at the time of signing judgment.

COSTS.

81. One day's notice of taxing costs, together with a copy of the bill of costs, and affidavit of increase (if any), shall be given to the solicitor of the department or attorney of the party whose costs are to be taxed by the other party or his attorney, in all cases where a notice to tax is necessary.

82. One appointment only shall be deemed necessary for proceeding in the taxation of costs.

83. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person or by attorney.

84. The costs of the day for not proceeding to trial may be obtained by a side bar rule on affidavit.

85. When issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the judgment or finding, and if the party entitled to the general costs of the cause obtains a verdict on any material issue, he will also be entitled to the general costs of

EXHIBIT REPORTS.

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the trial, but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party.

86. On all rules and orders of the Court or Judge, where costs are directed to be paid to the Crown, a certificate shall be granted by the Queen's Remembrancer of the costs allowed, and on default of payment the solicitor of the department may sue out a subpoena for the payment of such costs, and on an affidavit of service thereof, and demand made and nonpayment, a fiat for an attachment may be granted.

JUDGMENTS.

87. Judgments may be signed either in term or vacation, and shall be entered of the day, month, and year (whether in term or vacation), when signed, and shall not have relation to any other day, but it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc.

88. All judgments after trials at nisi prius or at bar may be signed and execution issued thereon in 14 days, and in cases of claim such writ or order as may be applicable may also issue in the like period, unless the Judge or Court who tried the cause, or some other Judge or the Court, shall order execution to issue against the defendant, or, in case of claim such writ or order as aforesaid, at an earlier or later period with or without terms.

89. It shall not be necessary before issuing execution on any judgment whatever, to enter the proceedings on the roll, but a judgment adapted to the particular case, according to the forms in Schedule B., is to be filed on parchment in the Queen's Remembrancer's office, by the party entitled to the same, and shortly entered in the judgment book, except in cases when the judgment roll is required by the party, or ordered by a Judge to be carried in, when a complete copy of the proceedings must be filed in the Queen's Remembrancer's office, for the purpose of being enrolled therein, and the same shall be enrolled by the proper officer.

90. On default of pleading after appearance, judgment may be signed, and execution issue forthwith.

91. In cases of error, where the proceedings are to be enrolled, the copy of such proceedings shall be filed at the Queen's Remembrancer's office, by plaintiff in error, within six days after delivering to the Queen's Remembrancer the memorandum alleging that there is error.

For Introductory Words of a Judgment after Verdict when the Roll is carried in, see Form 5, Schedule C.

WRIT OF INQUIRY IN RESPECT OF PROFITS OR UNLIQUIDATED DAMAGES.

92. When the claim of the Crown is in respect of profits or unliquidated damages, and the Crown is entitled to sign judgment by default, either for non-appearance or otherwise, the judgment (except

as hereinafter mentioned) shall be interlocutory, and thereupon a writ of inquiry in Form No. 13, Schedule A., may issue to assess the profits or damages as on the Common Law side of the Court, and ten days notice of the inquiry shall be given to the defendant's attorney, if he has appeared by attorney, or to the defendant, if otherwise; but final judgment shall not be signed until four days after the writ of inquiry and inquisition has been filed if the return of the writ is past, if not, four days after such return shall have taken place; provided that in such cases where the Crown elect to apply to the Court to impose a fine, the judgment may be final, as heretofore.

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WRIT OF EXECUTION.

93. Upon any judgment in intrusion for the removal of persons intruding on the Queen's possession of lands or premises and for costs, there may be either one writ or separate writs of execution for such removal, and for the costs, at the election of the Attorney General, and the form of the writ or writs for such purposes may be in Form 10, in Schedule A. hereto annexed.

94. No writ of execution shall be issued until judgment has been signed.

95. Every writ of execution for the recovery of any debt, penalty, or sum of money shall be endorsed with a direction to the sheriff or other officer or person to whom the writ is directed, to levy only the money really due and payable, and sought to be recovered under the judgment.

96. After judgment for the Crown upon any claim, a writ of execution may issue for the costs, in addition to the writ applicable to the property relating to such claim.

PROCEEDINGS IN ERROR.

97. Either party alleging error in *law* may deliver to the Queen's Remembrancer a memorandum in writing, in the form contained in the Schedule (C.) to these rules annexed, Form [6], or to the like effect entitled "In the Exchequer and suit," and signed by the party or his attorney, alleging that there is error in law in the record and proceedings, whereupon the Queen's Remembrancer shall file such memorandum, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note, together with a statement of the grounds of error intended to be argued, may be served on the solicitor of the department or attorney in the cause, as the case may be. Proceedings in error in law shall be deemed a supersedeas of execution from the time of the service of the copy of such note, together with the statement of the grounds of error intended to be argued, until default in putting in bail or an affirmance of the judgment, or discontinuance of the proceedings in error, or until the proceedings in error shall be otherwise disposed of without a reversal of

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the judgment; provided always, that if the grounds of error shall appear to be frivolous, the Court or a Judge upon summons may order execution to issue.

98. Upon any judgment hereafter to be given for the Crown on the Revenue side of the Court in any suit, including intrusion, except on special verdict, special case, or bill of exceptions, execution shall not be stayed or delayed by proceedings in error or supersedeas thereupon, without the special order of the Court, or a Judge, or consent of Attorney General, unless the person in whose name such proceedings in error be brought be bound with two, or, by leave of the Court or a Judge, more than two, sufficient sureties, shall, within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto Her Majesty, Her heirs or successors, by recognizance of bail, to be acknowledged in this Court, in double the sum adjudged to be recovered by the said judgment (except in case of a penalty, and in case of a penalty in double the sum really due, and double the costs, and in cases of intrusion double the yearly value of the property and double the costs recovered by the judgment), to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error be discontinued by the plaintiff therein) all and singular the sum or sums of money and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be also awarded for the delaying of execution; provided always, that the Court or a Judge may direct any other form of security to be given, and to such amount as may seem to the Court or a Judge sufficient, or may order money to be paid into Court in such manner and to such amount as may be deemed sufficient.

99. The assignment of and joinder in error in law shall not be necessary or used, and instead thereof a suggestion to the effect that error is alleged by the one party and denied by the other, may be entered on the judgment roll, in the form contained in Schedule (C.) to these rules annexed, Form (7), or to the like effect.

100. The roll shall be made up and the suggestion last aforesaid entered by the plaintiff in error within 10 days after the service of the note of the receipt of the memorandum alleging error, or within such other time as the Court or a Judge may order; and, in default of such suggestion, the defendant in error shall be at liberty to sign judgment of non pros.

101. The several provisions contained in the 154th, 155th, 156th, and 157th sections of the Common Law Procedure Act, 1852, where applicable, shall extend and be applied in like cases on the Revenue side of the Court.

102. Either party alleging error in *fact* may deliver to the Queen's Remembrancer a memorandum in writing, in the form contained in the Schedule (C.) to these rules annexed, Form (8), or to the

like effect intituled "In the Exchequer and Suit," and signed by the party or his attorney, alleging that there is error in fact in the proceedings, together with an affidavit of the matter of fact in which the alleged error consists; whereupon the Queen's Remembrancer shall file such memorandum and affidavit, and deliver to the party lodging the same a note of the receipt thereof; and a copy of such note and affidavit may be served on the opposite party or his attorney; and such service shall have the same effect, and the same proceedings may be had thereafter as heretofore had after the service of the rule for allowance of a writ of error in fact.

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103. The several enactments and provisoes contained in the Common Law Procedure Act, 1852, sections 159 to 166, both inclusive, shall, so far as the same are applicable, extend and be applied to like proceedings in error on the Revenue side of the Court.

104. The sureties in cases of bail in error are to be approved of by the solicitor of the department, in like manner as on a *capias*, but if the bail piece cannot be completed in four days, as mentioned in Rule 98, further time may be applied for to a Judge.

105. After suggestion in error has been entered on the roll, either party may set the cause down with the Queen's Remembrancer four clear days before the day appointed for arguing errors from the Exchequer; and four clear days before such day of argument the plaintiff in error must deliver paper books to the Judges of the Court of Queen's Bench, and the defendant in error must deliver paper books to the Judges of the Court of Common Pleas. Whoever sets down the cause must give immediate notice to the other party that he has done so.

CLAIMS.

106. All claims under extents, *diem clausit extremum*, indentures of appraisement, or transcript of writs and inquisitions, shall be entered on the respective records, and also in the Claim Book. If part only of property be claimed, the unclaimed part thereof may be dealt with in the same manner as if there had been no claim.

107. Claim may be entered at any time before process issued, or order obtained for realizing the property returned into Court.

NEW TRIALS.

108. In every rule *nisi* for a new trial, or to enter a verdict or non-suit, the grounds upon which such rule shall have been granted shall be shortly stated therein.

109. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second.

PLEADING TO ESTREATED RECOGNIZANCES.

110. When application is to be made to the Court or a Judge by any party seeking to be relieved from his estreated recognizance the

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same may be made on petition to the Court or a Judge, or by motion founded on a constat of such estreat, to be obtained from the office, and supported by such affidavits as the party may deem necessary. A copy of the petition or notice of the motion must be served on the Solicitor of the Treasury four days before the hearing of the same.

111. If a party to an estreated recognizance intends to plead thereto, he must obtain a constat of the recognizance at the office, and enter an appearance thereto, and plead to such estreat within fourteen days from the day of entering the appearance, and deliver such plea to the Solicitor of the Treasury, and the proceedings may be carried on as in other cases.

EXECUTION ON ESTREATS.

112. In cases of process issuing for the recovery of any fines, issues, amerciaments, penalties, and recognizances estreated, the writ to be first used may be set out in Form 11, Schedule A., but the long writ heretofore in use may be issued when necessary or required as a second or subsequent writ.

RULES TO RETURN WRITS OR BRING IN THE BODY.

113. The rules numbered 130 to 134, both inclusive, of the General Rules of Hilary Term, 1852, as to returning writs or bringing in the body, &c, where applicable, shall extend to, be adapted and applied to the Revenue side of the Court.

RULES AND ORDERS.

114. The writ heretofore used calling upon a party to perform a rule or order shall not be necessary or used to bring such party into contempt; but the serving of a copy of the rule or order under the seal of the office, or the copy of an office copy of such rule or order, shall be sufficient to ground an application for an attachment or other writ, as the case may be.

115. No rule to appear, plead, deliver subsequent pleadings, claim, or for concilium, or judgment, shall be necessary.

116. It shall not be necessary to the regular service of a rule or order that the original or office copy thereof should be shewn, unless sight thereof be demanded, except in cases of attachment.

117. Service of pleadings, notices, summonses, orders, rules, and other proceedings shall be made before seven o'clock p.m.; if made after that hour the service shall be deemed as made on the following day, but on Saturday the service must be made before two o'clock, p.m., otherwise to be deemed as made on Monday.

AFFIDAVITS.

118. Every affidavit in any suit or proceeding on the Revenue side of the Court shall be drawn up in the first person, and shall be divided

into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit, or part of an affidavit, substantially departing from this rule.

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119. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be made use of in Court, or before the Queen's Remembrancer, unless by leave of the Court or a Judge.

120. No rule which the Court has granted upon the foundation of any affidavit shall be of any force, unless such affidavit shall have been actually made before such rule was moved for, and produced in Court at the time of making the motion.

121. All affidavits in Revenue matters used before a Judge out of Court shall be filed with the Queen's Remembrancer, and such affidavits shall forthwith be delivered to the Queen's Remembrancer, in order to be filed.

122. No party shall be required to take an office copy of his own affidavit, or be permitted to inspect or take an office copy of any affidavit for a *capias* to hold to bail, except by order of the Court or a Judge.

SATISFACTION WARRANT AND NOLLE PROSEQUI.

123. The form of the satisfaction warrant may be in Form 9, Schedule C., in the Schedule hereto annexed, or as near thereto as the case may admit of; the same shall be engrossed on parchment and endorsed by the solicitor of the department from whence the proceedings emanated, afterwards signed by the Attorney General, and then filed in the Queen's Remembrancer's office. The *nolle prosequi* may be in Form 14, Schedule C.; the same must be engrossed on parchment and, after being signed by the Attorney General, filed in the Queen's Remembrancer's office.

LAND TAX ACT, 1ST AND 2ND VICT. CAP. 58.

124. In any application to the Court under this Act where the Crown is not a party, the order is to be drawn up, and the proceedings are to take place, on the plea side of the Court.

WARRANTS OF NISI PRIUS AND TALES.

125. The record of *nisi prius* may be made up without any warrant of *nisi prius* being obtained, and tales may be prayed on behalf of the Crown, without any warrant for that purpose. Tales, 6 Geo. 4, c. 50, s. 37.

LETTERS PATENT APPOINTING COMMISSIONERS OF CUSTOMS AND WRITS OF ASSISTANCE.

126. Letters patent appointing the Commissioners of Customs are to be enrolled in the Queen's Remembrancer's office, but the writ of assistance is to be prepared and issued in the same manner as other writs.

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WRITS OF SUMMONS FOR RECOVERY OF LEGACY OR SUCCESSIONS DUTY.

127. A full præcipe of the names of all the parties in these cases shall be sufficient without leaving a full copy of the writ; such writ shall be in force six calendar months, but may be renewed by resealing as a subpoena ad respondendum.

For Form of Writ, see Schedule A., No. 12.

SPECIAL CASES FROM MAGISTRATES OR QUARTER SESSIONS; ALSO SPECIAL CASES UNDER THE STAMP ACT.

128. The above special cases are to be filed as at present, but not enrolled, unless the enrolment be necessary after giving judgment, when the same is to be prepared in the Queen's Remembrancer's office.

WRITS OF LEVARI FACIAS AGAINST DEFAULTERS AND COLLECTORS.

129. When writs against either of the above parties are brought to the office to be sealed, there shall at the same time be filed the certificate of the receiving officer or other party, together with the affidavit and fiat for process to issue.

TRIALS AT BAR.

130. Where any trial at bar is to take place, in addition to the respective pleadings being delivered between the parties, each party is to file a copy of his pleadings at the Queen's Remembrancer's office for the purpose of being enrolled. The trial is to take place on the roll.

EXEMPLIFICATION OF RECORDS.

131. Any matter required to be exemplified shall be enrolled in the Queen's Remembrancer's office, and the exemplification prepared therein, as at present.

PAYMENT OF MONEY INTO COURT, &c.

132. The party wishing to pay money into Court, either under Act of Parliament or by order of Court or a Judge, must apply at the office of the Queen's Remembrancer for a "Direction" to do so, which direction must be taken to the Bank of England, and the money there paid in; after payment, the receipt obtained from the Bank of England must be filed at the Queen's Remembrancer's office.

133. If the money is to be invested, paid out, or otherwise disposed of, an order of the Court or a Judge must be obtained for that purpose, upon notice to the opposite party.

134. The orders relating to the above matters are to be drawn up in the Queen's Remembrancer's office.

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143. These rules shall not be deemed to apply to suits in Equity.

144. Writs into counties palatine may be directed to the sheriffs of those counties respectively.

145. Where any deed or other instrument is directed by statute to be enrolled in the Court of Exchequer, the same may be enrolled without obtaining a fiat for that purpose, and shall be enrolled of the day, month, and year when the same was delivered at the Queen's Remembrancer's office, with such introductory words as may be necessary.

146. That the foregoing Rules shall come into operation and take effect on Wednesday the 24th day of October A.D. 1860, and with respect to any matter or proceeding then pending these Rules may (so far as they are applicable to any step or proceeding to be thereafter taken) be adopted and applied accordingly.

FRED. POLLOCK.
SAMUEL MARTIN.
G. BRAMWELL.
W. F. CHANNELL.
JAMES WILDE.

22nd June 1860.

SCHEDULES.

FORMS OF WRITS, PROCEEDINGS, &c.

The forms contained in the following Schedules may be used in the cases to which they are applicable, with such alterations as the nature of the suit, the character of the parties, or the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance, shall not affect their validity or regularity.

SCHEDULE A.

FORM No. 1.

Form of Subpœna.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. We command and strictly enjoin you, That within fourteen days from the service of this writ, inclusive of the day of such service, you cause an appearance to be entered for you in Our Court of Exchequer at Westminster, to answer Us concerning certain articles then and there on Our behalf to be objected against you; and take

notice that in default of your so doing, We shall proceed thereon to judgment and execution. Witness , at Westminster, the day of , in the year of our Lord one thousand eight hundred and

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(Indorsement.)

At the suit of Her Majesty's Attorney General (*or, as the case may be*).

By information

This writ is issued against you by A. B., the solicitor of (*as the case may be*)

(*if for Penalties*)

for the forfeiture by you of £ for penalties under the statutes relating to the Revenue of Customs [*Excise, Stamps, Taxes, &c. or as the case may be*].

(*or, if for Duties or a Debt*),

for the recovery of £ for duties due from you under the statutes relating [*&c. as before—or state shortly the nature of the debt*].

Take notice, that in default of your entering an appearance in Our Court of Exchequer, according to the exigency of this writ, an information may be filed and judgment signed thereon, and execution issued on such judgment, together with costs, at the expiration of fourteen days from the day of signing such judgment.

FORM No. 2.

Form of Subpœna for Intrusion for the Removal of Persons intruding.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To and to all persons entitled to defend the possession of the property, described in the indorsement on this writ, greeting. We command and strictly enjoin you, That within fourteen days from the service of this writ, inclusive of the day of such service, you cause an appearance to be entered for you in Our Court of Exchequer at Westminster, to answer Us concerning certain articles then and there on Our behalf to be objected against you, and to defend yourself from being removed from the property described in the endorsement on this writ, and take notice, that in default of your so doing, We shall proceed thereon to judgment and execution.

Witness , at Westminster, the day of , in the year of our Lord one thousand eight hundred and

(Indorsement.)

At the suit of Her Majesty's Attorney General (*or, as the case may be*.)

By information

This writ is issued against you by A. B., the solicitor of (*as the case*

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may be) for the recovery of certain lands, messuages, and premises situate in the parish of _____ in the county of _____
(describing the property with reasonable certainty.)

Take notice, that in default of your entering an appearance in Our Court of Exchequer, according to the exigency of this writ, an information may be filed and judgment signed thereon, and execution issued on such judgment at the expiration of fourteen days from the day of signing such judgment, and you will be turned out of possession.

FORM No. 3.

Form of Subpœna for Intrusion for Profits or for Damages.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith : To _____ greeting. We command and strictly enjoin you, that within fourteen days from the service of this writ, inclusive of the day of such service, you cause an appearance to be entered for you in Our Court of Exchequer at Westminster, to answer Us concerning certain articles then and there on Our behalf to be objected against you ; and take notice, that in default of your so doing, We shall proceed thereon to judgment.

Witness _____, at Westminster, the _____ day of _____ in the year of our Lord one thousand eight hundred and _____

(Indorsement.)

At the suit of Her Majesty's Attorney General (*or as the case may be*).

By information

This writ is issued against you by A. B., the solicitor of (*as the case may be*) [*if for the recovery of profits*] for the recovery from you of the profits of certain lands, messuages, and premises, situate in the parish of _____, in the county of _____

(describing the property with reasonable certainty).

[*or, if for damages*] for certain entries, intrusions, and trespasses committed by you on certain lands, messuages, and premises, situate in the parish of _____, in the county of _____

(describing the property as before) [*or, as the case may be*].

Take notice, that in default of your entering an appearance in Our Court of Exchequer, according to the exigency of this writ, an information may be filed and judgment signed thereon.

FORM 4.

Form of Capias.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith : To the Sheriff of the county of _____ greeting. We command you, That you do not omit by reason of any liberty of your bailiwick, but enter

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the same, and take C. D. by his body, wherever you find him in your bailiwick, and that you keep him safely and securely until he shall have given you bail,* or until the said C. D. shall by other lawful means be discharged from your custody. And We do further command you that, on execution hereof, you do deliver a copy of this writ to the said C. D. And We do hereby require the said C. D. to take notice, that within fourteen days after execution hereof on him, inclusive of the day of such execution, he shall cause an appearance to be entered for him in Our Court of Exchequer at Westminster, to answer Us touching certain articles to be exhibited against him before Our said Barons by Our Attorney General, and shall within the same time cause special bail to be put in for him to the said suit; and that, in default of so doing, such proceedings may be had and taken as are mentioned in the warning written or endorsed hereon. And We do further command you that, immediately after the execution hereof, you do return this writ to Our said Court of Exchequer, together with the manner in which you have executed the same, and the day of execution thereof, or, if the same shall remain unexecuted, then that you do so return the same at the expiration of six calendar months from the date hereof, or sooner, if you shall be thereto required by order of the said Court, or by any Judge thereof.

Witness at Westminster, the day of
in the year of our Lord one thousand eight hundred and

(Indorsement.)

This writ is issued against the said C. D. by A. B., the solicitor of
(as the case may be).

(if for Penalties)

for the forfeiture by the said C. D. of £
for penalties under the statutes relating to the Revenue of Customs
(Excise, Stamps, Taxes, &c., or as the case may be).

(or if for Duties or a Debt)

for the recovery of £ for duties due from the said C. D.
under the statutes relating (*&c., as before—or state shortly the nature of the debt.*)

A Warning to the Defendant.

If a defendant, having given bail on the arrest, shall omit to enter an appearance, and put in special bail, as within required, the Crown may proceed against the sheriff, or on the bail bond, and may file an information against you and sign judgment thereon, and issue execution on such judgment, together with costs, at the expiration of fourteen days from the day of signing such judgment.

Bail for £

Capias Detainer.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the
of greeting. We command you, That you keep and

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detain the body of now a prisoner in Our prison, under your custody, safely and securely, until he shall have given you bail [as in preceding form from the asterisk *.]

FORM 5.

Form of Scire Facias on Bond to the Queen.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To A. B.

of in the county of greeting. Whereas you the said A. B., by bond or writing obligatory, sealed with your seal, made at Westminster, in the county of Middlesex, dated the day in the year of our Lord one thousand eight hundred and , became bound to Us in the sum of of lawful money of Great Britain, payable at a day past, which said sum of money you have not yet paid or caused to be paid to Us as we are informed. And We, being desirous to be satisfied the same with all the speed We can (as is just), do command you, that within fourteen days from the service of this writ, including the day of service, you cause an appearance to be entered for you in Our Court of Exchequer at Westminster; and take notice, that in default of your so doing judgment will be signed against you forthwith, and execution issued at the expiration of fourteen days from the day of signing such judgment for the said sum of together with costs.

Witness at Westminster, the day of in the year of our Lord one thousand eight hundred and

Take notice, that if you appear in due time according to the exigency of this writ, you are required to plead thereto in fourteen days from the date of such appearance, including the day of such appearance, and in default judgment may be signed and execution issued forthwith. The plea must be delivered to the solicitor of the department issuing out this writ.

FORM 6.

Form of Scire Facias on Bail Bond.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To A. B. of

in the county of greeting. Whereas you the said A. B., by bond or writing obligatory, sealed with your seal, made at Westminster, in the county of Middlesex, dated the day of in the year of our Lord one thousand eight hundred and became held and firmly bound to sheriff of the said county of in the sum of of good and lawful money of Great Britain, to be paid to the said sheriff at a day past. And whereas, by a certain assignment of the said bond, the said sheriff, at Our request, costs, and charges, hath assigned unto Us for Our use the said bond or writing obligatory; and which said sum of

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FORM 8.

Form of Scire Facias on Inquisition held under Writ of Extent or Diem Clausit Extremum.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To A. B. of
in the county of greeting. Whereas [*here recite the substance of the Writ of Extent or Diem Clausit Extremum*]. And whereas by an [*or another*] inquisition indented, taken at on the day of before the sheriff of the said county, by virtue of Our Writ of Extent [*or Diem Clausit Extremum*], issued out and under the seal of Our Court of Exchequer at Westminster, against the said , his estate and effects [*or, the estate and effects of the said*], for the recovery of the said debt: It was found on the oath of and others, good and lawful men of the said sheriff's bailiwick, that you the said A. B. were indebted [*as is inquisition*] which said debt the said sheriff, on the day of taking the said inquisition, had seized and taken into Our hands according to the command of the said writ, and the same still remains due and unpaid to Us, as We are informed, as by the said Writ of Extent [*or Diem Clausit Extremum*] and inquisition taken thereupon, returned and filed in Our said Exchequer, more fully appears. And We, being desirous to be satisfied the same with all the speed We can (as is just), do command you, that within fourteen days from the service of this writ, including the day of service, you cause an appearance to be entered for you in Our Court of Exchequer at Westminster; and take notice, that in default of your so doing judgment will be signed against you forthwith, and execution issued at the expiration of fourteen days from the day of signing such judgment for the said sum of together with costs

Witness at Westminster the day of
in the year of our Lord one thousand eight hundred and

Take notice, that if you appear in due time according to the exigency of this writ, you are required to plead thereto within fourteen days from the date of such appearance, including the day of such appearance, and in default judgment may be signed, and execution issued forthwith. The plea must be delivered to the solicitor of the department issuing out this writ.

FORM 9.

Form of Scire Facias against Executors.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To A. B. of
in the county of greeting. Whereas C. D. of by his bond or writing obligatory, sealed with his seal, made at Westminster, in the county of Middlesex, dated the

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day of in the year of our Lord one thousand eight hundred
and became bound to Us in the sum of of lawful
money of Great Britain, payable at a day past, which said sum of
money the said C. D. hath not paid or caused to be paid to Us, as We
are informed. And whereas the said C. D. hath departed this life,
having first made and published his last will and testament in writing,
and thereby appointed you, the said A. B., executor thereof, who
have duly proved the same, and taken upon yourself the execution
thereof, as We are informed. And We, being desirous to be satisfied
the said sum of with all the speed We can (as is just), do
command you, that within fourteen days from the service of this
writ, including the day of service, you cause an appearance to be en-
tered for you in Our Court of Exchequer at Westminster; and take
notice, that in default of your so-doing judgment will be signed
against you forthwith, and execution issued at the expiration of four-
teen days from the day of signing such judgment for the said sum of
together with costs, out of the goods and chattels which
belonged to the said C. D. at the time of his death, and come to your
hands and possession to be administered.

Witness at Westminster, the day of
in the year of our Lord one thousand eight hundred and

Take notice, that if you appear in due time, according to the
exigency of this writ, you are required to plead thereto within four-
teen days from the date of such appearance, including the day of such
appearance, and in default judgment may be signed and execution
issued forthwith. The plea must be delivered to the solicitor of the
department issuing out this writ.

FORM 10.

*Form of Writ of Execution for Removal of Persons intruding or for
the Possession and Costs where no Fine sought to be levied.*

VICTORIA, by the Grace of God of the United Kingdom of Great
Britain and Ireland Queen, Defender of the Faith: To the Sheriff of
the county of greeting. Whereas, by virtue of a judgment
entered up in Our Court of Exchequer at Westminster, We command
you, that you omit not by reason of any liberty of your bailiwick, but
that you enter the same, and immediately after receipt of this Our
writ you remove or cause to be removed and every
other person, from the possession of and from
all and every part or parcel thereof, and that you take the said
into Our hands, so that We may hold the same to Us, Our
heirs and successors, for ever, free from any disturbance or interrup-
tion from the said or any person or persons claiming
under him;* [*if for possession only, then proceed thus:*] and that you
make distinctly and plainly appear to the Barons of Our Exchequer
at Westminster, on the day of in what manner this

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Our command shall have been executed, and that you then have there this writ.

Witness, &c., [as at the end].

[If for Costs as well as Possession, then proceed thus from asterisk*:]

And We further command you that you cause to be made and levied to Our use of the goods and chattels, lands and tenements, of the said in your bailiwick, the sum of of lawful money of Great Britain, which We by the aforesaid judgment have recovered against the said for costs, and when you have levied the said money that you have the same before the Barons of Our Exchequer at Westminster, on the day of to be then paid into Our Court to Our use; and if it shall happen that the goods and chattels, lands and tenements, of the said shall not be sufficient to pay the said money, then that you omit not by reason of any liberty of your bailiwick, but that you enter the same, and take the said by body wherever he shall be found in your said bailiwick, and that you keep him safely and securely so that you have body before Our said Barons at the said day and place, to satisfy Us the said money, and that you make distinctly and clearly appear to Our said Barons on the said day of all that you have done in the premises, and have there this writ.

Witness at Westminster, the day of in the year of our Lord one thousand eight hundred and

[If for Costs only, the ordinary *fi. fa.* may issue by inserting the words "for Costs," after stating the amount, and "money" instead of "Debt," in latter part of writ.

Where Fine in addition to Possession and Costs, or Damages, are sought to be recovered, this form may be altered accordingly.]

FORM 11.

Form of Writ of Execution on Estreat.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Sheriff of Our of greeting. We command you, That you do not omit, by reason of any liberty in your bailiwick, but enter the same, and levy out of the goods and chattels of the several persons named in the schedules annexed to this writ, the several sums of money charged upon them and each of them in the said schedules, or required from them or any of them, so that you have that money before the Barons of Our Exchequer at Westminster without delay, and from time to time as you shall levy the same. And if it shall happen that the goods and chattels of the said persons in the said schedules named, or of any of them, are not sufficient in your bailiwick for payment of the several sums of money charged upon them and each of them in the said schedules, then you shall not omit by reason of any liberty in your bailiwick, but enter the same and take

the bodies of the said several persons and each of them not having goods (peers, lords, and ladies only excepted), wherever you shall find them in your bailiwick, and keep them in safe custody in Our prison until they have fully satisfied Us the several debts charged upon them and each of them in the said schedules. And what you shall do herein you shall make appear to the Barons of our Exchequer at Westminster, on the day of next ensuing, and that you then have there this writ.

Witness at Westminster, the day of
in the year of our Lord one thousand eight hundred and

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FORM 12.

Writ of Summons for Recovery of Legacy or Successions Duty.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To greeting. Whereas we have been given to understand in Our Court, before Our Barons of the Exchequer at Westminster, that you being accountable part within the true intent and meaning of the statute passed in the Parliament holden in the sixteenth and seventeenth years of Our reign, chapter fifty-one [*if issued under the Legacy Duty Acts, insert, and the Legacy Duty Acts*], have been required by Our Commissioners of Inland Revenue to render an account pursuant to the said statute, [*if under Legacy Duty Acts and the said Acts*], and have made default therein. Now We command you that (all excuses ceasing) within fourteen days from the service of this writ, or a copy thereof, you do deliver to the said Commissioners of Inland Revenue an account upon oath of , and that you do within the same time pay the duty chargeable ; or that you the said do within the same time appear before the Barons of Our said Exchequer at Westminster, and shew cause why you make default in the premises, and this you are in no wise to omit upon pain of process of contempt issuing against your person for your neglect herein.

Witness at Westminster, the day of
in the year of our Lord one thousand eight hundred and

FORM 13.

Writ of Inquiry to ascertain Amount of Profits or Damages.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Sheriff of the county of greeting. Whereas Our Attorney General on Our behalf hath lately in Our Court of Exchequer at Westminster filed an information against A.B. for [*state the substance of the information, exclusive of the conclusion, then proceed thus:*] And the said Attorney General hath claimed on Our behalf £ ; And such

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proceedings were thereupon had in Our said Court, that We ought to recover against the said A. B. Our damages on occasion of the premises; but because it is unknown to Our said Court what damages We have sustained in that behalf, therefore We command you that by the oath of twelve good and lawful men of your bailiwick you diligently inquire what damages We have sustained on occasion of the premises aforesaid, and that you send to the Barons of Our Exchequer at Westminster on the day of now next ensuing the inquisition which you shall thereupon take under your seal and the seals of those by whose oath you shall take that inquisition, together with this writ.

Witness , at Westminster, the day of
 in the year of our Lord one thousand eight hundred and

SCHEDULE B.

The Forms in the following Judgments are to be used when there is no entry on the roll. When a roll is carried in, the proceedings, with the dates when they arose, must be entered on the roll, and the Judgment in that case, from the words "Therefore it is considered" in the following forms, may be adapted to the particular case.

Form of Judgment by Default, &c. to Subpœna.

In the Exchequer.

The day of , in the year of our Lord one thousand eight hundred and

(*Teste of writ.*)

Middlesex to wit. On the day and year above written a writ of subpœna issued forth of this Court against A.B. at the suit of Her Majesty's Attorney General, on behalf of Her Majesty, for [*state shortly for what the writ is issued.*]*

[*For want of Appearance thus :*]

And whereas the said A. B. was, on the day of , A.D. 18 , duly served with the said writ, but hath made default in appearing thereto, and thereupon an information, numbered , was on the day of , A.D. 18 , filed against him in this Court: Therefore &c. (*judgment as after set out*).

[*For want of Plea as above to asterisk *, then proceed thus :*]

And whereas on the day of , A.D. 18 the said A. B. by C. D., his attorney, entered an appearance to the said writ, but hath made default in pleading to the information, numbered , filed against him in this Court on the day of A.D. 18 : Therefore, &c. (*judgment as after set out.*)

[*Withdrawal of Plea, as in first Form to asterisk*, then proceed thus :*]

And whereas on the day of , A.D. 18 , the said A. B., by C. D., his attorney, entered an appearance to the said writ, and

afterwards pleaded to the information, numbered , filed against him in this Court on the day of , A.D. 18 . And on the day of , A.D. 18 , the defendant withdrew such plea: Therefore, &c. (*judgment as after set out*).

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[*Confession to information, as in first Form to asterisk*, then proceed thus :*]

And whereas on the day of , the said A. B., by , his attorney, entered an appearance to the said writ, and on the day of confessed to the information, numbered , filed in this Court against him on the day of , A.D. 18 .

[*For Debt or Duties.*]

Therefore, it is considered that Her Majesty do recover against the said A. B. the several sums of money in the said information mentioned, amounting together to the sum of £ [or the sum of £ in the said information mentioned. "If costs taxed in any case conclude thus, or as near as may be":.] and also the sum of £ for Her Majesty's costs of suit, which said sums in the whole amount to £ .

Judgment
signed the
day of
A.D. 18 .

[*For Penalties.*]

Therefore, it is considered that the said A. B. be convicted of the offence [or several offences] in the said information mentioned, and that he do for his said offence [or offences] forfeit the sum of £ [or the several sums of money, amounting together to the sum of £] in the said information also mentioned, and that Her Majesty do recover against the said A. B. the said sum of £ [if costs taxed proceed as in preceding Form].

Judgment
signed the
day of
A.D. 18 .

[*Penalties and Duties.*]

Therefore, it is considered that the said A. B. be convicted of the several offences in the 1st, 2d, and 3d counts [or, as the case may be.] of the said information mentioned, and that he do, for his said offences, forfeit the several sums in those counts respectively mentioned, amounting to the sum of £ , and that Her Majesty do recover against the said A. B. the said sum of £ , and also the several sums of money in the 4th, 5th, and 6th counts [or, as the case may be.] of the said information mentioned, amounting to the sum of £ , which sums together make the sum of £ [if costs taxed, proceed as in first Form].

Judgment
signed the
day of
A.D. 18 .

[*For Intrusion to remove Persons intruding.*]

Therefore, it is considered that the said A. B. be convicted of the entry, intrusion, and making entry in the said information mentioned, and that he be amoved from the possession of in the said information mentioned [if fine sought to be recovered these words may be inserted]: and that the said A. B. be taken by his body to make fine with our Lady the Queen for his said entry and intrusion.

Judgment
signed the
day of
A.D. 18 .

When Judgment by Default is signed in respect of part only of the Premises.

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Therefore it is considered that the said A. B. be convicted of the entry intrusion and making entry on part of the premises in the said information mentioned, that is to say [*describe the part*], and that he be amoved from the possession of the said [*describe the part as before*] in the said information mentioned [*conclude as before*].

[*For Form of Interlocutory and final Judgment in Intrusion to recover Profits or Damages, see pp. xxxvi., xxxvii.*]

Form of Judgment when Proceedings are by Capias.

For Non-appearance after Service of Information in Gaol.

The day of , in the year of our Lord 18 .

(*Teste of Writ.*)

Middlesex to wit. On the day and year above written, a writ of capias issued forth of this Court against A. B. at the suit of Her Majesty's Attorney General on behalf of Her Majesty for the forfeiture of the sum of £ * [*or as the case may be*]. And whereas the said A. B. hath been arrested by virtue of the said writ, and taken to prison by the sheriff of the county of , and, neglecting to give bail to the said sheriff for his appearance in this Court, an information, numbered , was on the day of , A.D. 18 , filed therein against the said A. B., a copy of which information was served upon him on the day of , A.D. 18 ; and the said A. B. still neglecting to appear here in Court, or plead to the said information for 20 days after such service: Therefore it is considered that the said A. B. be convicted of the several offences in the said information mentioned, and that he do for his said offences forfeit the several sums of money in the said information mentioned, amounting together to the sum of £ , and that Her Majesty do recover against the said A. B. the said sum of £ , (*if costs taxed proceed*) and also the sum of £ for Her Majesty's costs of suit, which said sums in the whole amount to £ .

Judgment
signed the
day of
A.D. 18 .

(*If for debt or duties, the same form of judgment, from the words "Therefore, &c.," may be used as is mentioned under the previous head of "Judgment by Default to Subpœna."*)

[*For Want of Appearance after giving Bail to Sheriff. As in preceding Form to asterisk *, then proceed thus:*]

And whereas the said A. B. was on the day of A.D. 18 arrested by the sheriff of the county of , by virtue of the said writ, but hath made default in appearing thereto; and thereupon an information, numbered , was on the day of , A.D. 18 , filed against him in this Court: Therefore, &c. [*conclude as before*].

[*For Want of Plea. To asterisk *, then proceed thus:*]

And whereas on the day of , A.D. 18 , the said A. B., by C. D., his attorney, entered an appearance to the said writ, and put in special bail herein, but hath made default in pleading to the

information, numbered , filed against him on the day of ,
A.D. 18 , in this Court: Therefore, &c. [*conclude as before*].

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[*On Withdrawal of Plea. To asterisk *, then proceed thus:*]

And whereas on the day of , A.D. 18 , the said A. B.,
by C. D., his attorney, entered an appearance to the said writ, and
put in special bail herein, and afterwards pleaded to the information,
numbered , filed against him in this Court on the day of ,
A.D. 18 , and on the day of A.D. 18 , the defendant
withdrew such plea: Therefore, &c. [*conclude as before*].

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GENERALES.

[*Confession to Information. To asterisk *, then proceed thus:*]

And whereas on the day of , A.D. 18 , the said A. B.,
by , his attorney, entered an appearance to the said writ, and on
the day of , A.D. 18 , confessed to the information, num-
bered , filed in this Court against him on the day of ,
A.D. 18 : Therefore, &c. [*conclude as before*].

*Form of Judgment by Default for Want of Appearance to Scire Facias,
Plea, &c., and after Verdict.*

The day of , in the year of our Lord 18 .

(*Teste of Writ*)

Middlesex [*or county*] to wit. On the day and year above written,
a writ of scire facias issued forth of this Court against A. B., for the
recovery of the sum of £ , the penalty of a certain bond given
to Her Majesty by the said A. B., bearing date the day of ,
A.D. 18 , [*or state the substance of the writ**]. And whereas the said
A. B. was on the day of in the year of our Lord 18 , duly
served with the said writ, but hath made default in appearing thereto:
Therefore it is considered that Her Majesty recover against the said
A. B., the said sum of £ , in the said writ of scire facias mentioned,
and [*if costs taxed, proceed*] also the sum of £ for Her Majesty's
costs of suit, which said sums in the whole amount to £

Judgment
signed the
day of
A.D. 18 .

[*For want of Plea, Rejoinder, or not joining in Demurrer, &c. As in
preceding Form to asterisk *, then proceed thus:*]

And whereas on the day of A.D. 18 , the said A. B. by
C. D., his attorney [*or in person*], entered an appearance to the said
writ, but hath made default in pleading thereto [*"or" rejoining to the
replication of Her Majesty's Attorney General, "or" joining in the de-
murrer of Her said Majesty's Attorney General to the* of the
said defendant: Therefore, &c. [*as in preceding Form*].

[*Withdrawal of Plea. To asterisk *, then proceed thus:*]

And whereas on the day of A.D. 18 , the said A. B., by
C. D., his attorney [*or in person*], entered an appearance to the said
writ, and afterwards pleaded thereto; and on the day of
A.D. 18 , withdrew such plea: Therefore, &c. [*as before*].

[*Confession to Scire Facias. To asterisk *, then proceed thus:*]

1860.
REGULE
GENERALIS.

And whereas on the day of A.D. 18 , the said A. B.,
by , his attorney, entered an appearance to the said writ.
and on the day of A.D. 18 , confessed thereto: There-
fore, &c. [*as before*].

[*After Verdict. To asterisk*, then proceed thus:*]

And whereas on the day of A.D. 18 , the said A. B.,
by C. D., his attorney [*or in person*], entered an appearance to the
said writ, and pleaded thereto; and whereas on the day of
A.D. 18 , on a verdict of the country, the said A. B. was
found indebted to Her Majesty in the sum of £ in the said writ
of scire facias mentioned: Therefore, &c. [*as before*].

[*If for Defendant after Verdict. To asterisk*, then proceed thus:*]

And whereas on the day of A.D. 18 , the said A. B.
by C. D., his attorney [*or in person*], entered an appearance to the said
writ, and pleaded thereto; and whereas on the day of
A.D. 18 , on a verdict of the country, the same was found for the de-
fendant: Therefore it is considered that as to the sum of £ in
the said writ of scire facias mentioned, the said A. B. do go hence
without day. (*If costs taxed, thus:*) And that the said A. B. do recover
from the Crown the sum of £ , for his costs of defence.

Judgment
signed the
day of
A.D. 18 .

*Form of Judgment on Information for Profits or Damages assessed on
a Writ of Inquiry.*

In the Exchequer.

The day of in the year of our Lord, 18

[*Teste of Writ.*]

Middlesex [*or county*] to wit. On the day and year above written
a writ of subpoena issued forth of this Court against A. B. at the
suit of Her Majesty's Attorney General on behalf of Her Majesty
for* [*state for what the writ issued*].

[*For want of Appearance, thus:*]

And whereas the said A. B. was on the day of A.D. 186 ,
duly served with the said writ, but hath made default in appearing
thereto, and thereupon an information numbered was on the
day of A.D. 186 , filed against him in this Court. And the
said A. B. not having appeared Her Majesty remains therein unde-
fended against the said A. B. Wherefore, &c. [*as after*].

[*For Want of Plea as above to asterisk*.*]

And whereas on the day of A.D. 186 , the said A. B., by
C. D., his attorney, entered an appearance to the said writ, but hath
made default in pleading to the information numbered filed
against him in this Court on the day of A.D. 186 . And
the said A. B. having made such default and said nothing in bar or
preclusion of the said information, whereby Her Majesty remains
therein undefended against the said A. B. Wherefore Her Majesty

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 GENERALES.

[*If special verdict.*] And whereas on the day of
 A.D. 18 , on the trial of this information, a special verdict was
 found by the jury; and whereas on the day of , A.D. 18
 [when judgment given], on the argument of the said special verdict,
 the said A. B. was declared indebted to Her Majesty in the sum of
 £ : Therefore, &c.

[*After Argument on Demurrer. As above to asterisk *, then proceed
 thus:*]

And whereas on the day of , A.D. 18 , on the argu-
 ment of the demurrer of the said to the of the said
 , the said demurrer was allowed [*or overruled*]: Therefore, &c.

[*If for Penalties.*]

Judgment
 signed the
 day of
 A.D. 18 .

Therefore it is considered that the said be convicted of
 the several offences in the said information mentioned ["*or*" in the
 first and second counts of the said information mentioned, *as the case
 may be*], and that he do for his said offences forfeit the several sums of
 money in the said information also mentioned ["*or*" in the said first
 and second counts of the said information mentioned], amounting
 together to the sum of £ [*"if single value found,"* forfeit the
 sum of £ , being the treble value of the goods in the said
 information mentioned, "*or,*" in the first and second counts of the
 said information mentioned, "*or as the case may be*"], and that Her
 Majesty recover against the said the said sum of £ ;
 [*if costs taxed, proceed thus:*] and also the sum of £ , for Her
 Majesty's costs of suit, which said sums in the whole amount to £ .

[*If for Duties.*]

Judgment
 signed the
 day of
 A.D. 18 .

Therefore it is considered that Her Majesty recover against the said
 the several sums of money in the said information mentioned,
 amounting together to the sum of £ [*"or*" the sum of £
 in the said information mentioned]; [*if costs taxed, proceed thus:*] and
 also the sum of £ , for Her Majesty's costs of suit, which said
 sums in the whole amount to £ .

[*If for Intrusion.*]

Judgment
 signed the
 day of
 A.D. 18 .

Therefore it is considered that the said A. B. be convicted of the
 entry intrusion, and making entry in the said information men-
 tioned [*or, if for part only of the premises, describe the same as in
 pp. xxxiii, xxxiv.*], and that he be amoved from the possession of
 in the said information mentioned; [*if fine sought to be recovered, these
 words may be inserted:*] and that the said A. B. be taken by his body
 to make fine with Our Lady the Queen for his said entry and intru-
 sion; [*if costs taxed, proceed thus:*] and that Her Majesty do recover
 against the said the sum of £ for Her Majesty's costs
 of suit.

[*If for Damages.*]

Judgment
 signed the
 day of
 A.D. 18 .

Therefore it is considered that Her Majesty recover against the

said A. B. the said monies by the jurors aforesaid in form aforesaid assessed, and also £ for Her Majesty's costs of suit, which said monies and costs in the whole amount to £ .

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GENERALES.

Judgment in part for Crown and part for Defendant.

Therefore it is considered that the said A. B. be convicted of the several offences in the first and second counts of the said information mentioned [*or as the case may be*], and that he do for his said offences forfeit the several sums of money in the said first and second counts of the said information mentioned, amounting together to the sum of £ ; (*if costs taxed proceed thus :*) and also the sum of £ for Her Majesty's costs of suit, which said sums in the whole amount to £ . And it is further considered that as to the several other offences in the remaining counts of the said information mentioned the said A. B. do go hence without day.

Judgment
signed the
day of
A.D. 18 .

[*If for Defendant. As above, to asterisk *, then proceed thus :*]

And whereas on the day of , A.D. 18 , on a verdict of the country, the said A. B. was found not guilty of the several offences [*"or," not indebted to Her Majesty in the several sums of money, "or" "in intrusion" or "for damages" according to the facts*] in the said information mentioned: Therefore it is considered, that, as to the several offences [*"or" several sums of money, or in intrusion or for damages, as the case may be*] in the said information mentioned, the said A. B. do go hence without day; [*if costs taxed, proceed :*] and that the said A. B. do recover from the Crown the sum of £ for his costs of defence. [*If on special verdict, the above form to be varied accordingly.*]

Judgment
signed the
day of
A.D. 18 .

Form of Judgment on Writ of Appraisement and no Claim.

In the Exchequer.

The day of in the year of our Lord, 18 .

(*Teste of Writ of Appraisement.*)

Middlesex to wit. On the day and year above written a writ of Our Lady the Queen issued forth of this Court, for the valuing of several parcels of [*here set out the goods, or as the case may be*] seized as forfeited by officers of [*Excise*], and an information of seizure has been filed, praying that the said goods [*or, as the case may be*] may remain forfeited. And by an indenture filed in this Court, numbered , and made on the day of , A.D. 18 , the said [*goods*] are appraised at the sum of £ . And whereas no claim has been entered to the said goods [*or as the case may be*]: Therefore it is considered that the said [*goods*] do remain forfeited, and that the same be delivered to the Commissioners of , or their assigns, to be disposed of according to the statute in that behalf.

Judgment
signed the
day of
A.D. 18 .

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GENERALES.*Form of Judgment on a Verdict on Information in Rem.*

The day of in the year of our Lord 18 .
(*Teste of Writ of Appraisement.*)

Middlesex to wit. On the day and year above written, a writ of appraisement issued forth of this Court for the appraisement of several parcels of seized as forfeited by officers of . And whereas on the day of A.D. 18 , A. B. of by C. D., his attorney, entered an appearance and claim in this Court to the said goods [*or as the case may be*], and pleaded to the information numbered , filed on the day of , A.D. 18 , for the recovery of the same.* And whereas on the day of A.D. 18 , on a verdict of the country, the said [*goods*] were found to be forfeited to Her Majesty. Therefore, it is considered that the said goods [*or as the case may be*,] do, for the several reasons aforesaid, remain forfeited, and that the same be delivered to the Commissioners of or their assigns, to be disposed of according to the form of the statute in that case made and provided; [*if costs taxed, proceed thus:*] and that Her Majesty do recover against the said A. B. the sum of £ for Her Majesty's costs of suit.

Judgment
signed the
day of
A.D. 18 .

[*If Verdict for Claimant. As above to asterisk,* then proceed thus:*]

And whereas on the day of A.D. 18 , on a verdict of the county, the said [*goods*] were found not to have been forfeited. Therefore it is considered that the said goods [*or as the case may be*] be delivered to the said A. B., or to his assigns; [*if costs taxed, proceed:*] and that the said A. B. do recover from the Crown the sum of £ for his costs of defence.

Judgment
signed the
day of
A.D. 18 .

Form of Judgment for Want of Plea or other Pleadings, or after Verdict, or upon Demurrer to Extent or Diem Clausit Extremum.

The day of in the year of our Lord 18
(*Teste of Writ.*)

Middlesex (*or county*) to wit. On the day and year above written a writ of extent [*or diem clausit extremum*] issued forth of this Court, directed to the sheriff of the county of against A. B., for the recovery of the sum of £ for
[*as the case may be*].

And whereas by an inquisition taken by virtue of the said writ by the sheriff of the said county of , and filed in this Court, the said A. B. was found possessed of

[*here set out the property (shortly) which is claimed.*]

And whereas on the day of A.D. 18 , claim was entered by C. D. of by E. F., his attorney, to (*the property claimed*)*. And whereas default was made by the said C. D. in pleading to the said writ: Therefore it is considered that the said

Judgment
signed the
day of
A.D. 18 .

(the property claimed) do remain in Her Majesty's hands; (if costs taxed:) and that Her Majesty do recover against the said C. D. the sum of £ for Her Majesty's costs of suit.

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[For not Rejoining. As above to asterisk*, then proceed thus:]

And whereas default was made by the said C. D. in rejoining to the replication of Her Majesty's Attorney General: Therefore, &c. (as before).

[For not Joining in Demurrer. As above to asterisk*, then proceed thus:]

And whereas default was made in joining in the demurrer of Her said Majesty's Attorney General to the () of the said defendant: Therefore, &c. (as before).

[After Trial. As above to asterisk*, then proceed thus:]

And whereas after issue had been joined in this cause, and on the trial thereof on the day of A.D. 18 , a verdict was found for Her Majesty: Therefore, &c. (as before).

[On Argument of Demurrer. As above to asterisk*, then proceed thus:]

And whereas on the day of A.D. 18 , upon argument of the demurrer of the said to the of the said the said demurrer was allowed [or overruled:] Therefore, &c. (as above).

[On Withdrawal of Claim. As above to asterisk*, then proceed thus:]

And whereas on the day of A.D. 18 , the said C. D. withdrew his claim and plea to the property so claimed by him: Therefore, &c. (as before.)

[If Judgment for Defendant. As before to asterisk*, then proceed thus:]

And whereas after issue had been joined in this cause, and on the trial thereof on the day of A.D. : 18 , a verdict was found for the said C. D.: Therefore it is considered that Her Majesty's hands be amoved from the possession of the said in the said inquisition mentioned, and that the same be restored to the said C. D.; (if costs taxed, proceed thus:) and that the said C. D. do recover from the Crown the sum of £ for his costs of suit.

Judgment
signed the
day of
A.D. 18 :

[If on Demurrer. As before to asterisk*, then proceed thus:]

And whereas on the day of A.D. 18 , on the argument of the demurrer of the said to the of the said the said demurrer was allowed [or overruled:] Therefore, &c. (as last mentioned).

Form of Judgment for Defendant on Reversal of Outlaway.

In the Exchequer.

The day of in the year of our Lord, 18 (the day transcript was filed).

Middlesex [or county] to wit. On the day and year above written was filed in the office of Her Majesty's Remembrancer of this Court

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the transcript of a certain writ of capias utlagatum issued against A. B. of , and the inquisition taken thereunder by the sheriff of

(*Plea of Defendant.*)

And on the day of A.D. 18 , the said A. B. appears by , his attorney, and saith, that the said out-lawry is reversed, and for proof thereof brings into Court the following certificate ["or" order, *here set out the same*].

(*Confession of Attorney General.*)

And on the day of A.D. 18 , Sir Knt., Her Majesty's Attorney General, saith, that on perusing the certificate of [or order of] it sufficiently appears to him that what is contained in the said plea is true ; therefore, he will not proceed any further in the premises for Her said Majesty against the said A. B. : Therefore it is considered that Her Majesty's hands be removed from the said in the said inquisition mentioned ; and that he, the said A. B. be restored to the possession thereof (*and, if necessary*), together with the rents, issues, and profits of the same, which have not been answered to Her said Majesty.

[*At the time of filing this Judgment, the plea and certificate or order, and the confession of Attorney General, must be filed.*]

Form of Judgment for Want of Pleading, Withdrawing Plea, or after Verdict or Demurrer on Transcript of Outlawry.

In the Exchequer.

The day of ; in the year of our Lord 18 .

(*the day transcript was filed.*)

Middlesex [or county] to wit. On the day and year above written was filed, in the office of Her Majesty's Remembrancer of this Court, the transcript of a certain writ of capias utlagatum issued against , of , and the inquisition taken thereunder by the sheriff of . And whereas on the day of a claim was entered by C. D. of , by E. F., his attorney, to (*state shortly the property claimed, and set forth in the transcript.*) * And whereas default was made by the said C. D. in pleading to the said transcript. Therefore it is considered that the said (*the property claimed*) do remain in Her Majesty's hands, and [*if costs taxed*] that Her Majesty do recover from the said C. D. £ for Her Majesty's costs of suit.

[*For not Rejoining. . As before to asterisk*, then proceed thus :*]

And whereas default was made by the said C. D. in rejoining to the replication of Her said Majesty's Attorney General : Therefore, &c. (*as before*)

[*For not joining in Demurrer. As before to asterisk*, then proceed thus :*]

And whereas default was made in joining in the demurrer of Her said Majesty's Attorney General to the of the said defendant : Therefore, &c., (*as before*).

Judgment
signed the
day of
A.D. 18 .

Judgment
signed the
day of
A.D. 18 .

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Form of Judgment by Default against one Defendant, and another pleads to issue, and issue found for the Crown.

In the Exchequer.

The day of , in the year of our Lord 18 .

(*Teste of Writ.*)

The Customs Act 16 & 17 Vict. c. 100, s. 207, enables the Crown to find judgments against each defaultant when the penalty is pecuniary and several. This form is applicable when a joint penalty is due in such case.

Judgment signed the 10th of A.D. 1860.

Middlesex to wit. On the day and year above written, a writ of subpœna issued forth of this Court against A. B. and C. D., at the suit of Her Majesty's Attorney General, on behalf of Her Majesty, for ~~three shillings shroty for what the writ is issued~~. And whereas on the day of A.D. 18 , the said A. B., by E. F., his attorney, entered an appearance to the said writ and pleaded to the information, numbered , filed against him and the said C. D. on the day of A.D. 18 . And whereas the said C. D. was on the day of A.D. 18 , duly served with the aforesaid writ, but hath made default in appearing thereto, and thereupon the said information, numbered , has been filed against him and the said A. B. in this Court: And by reason of the default of the said C. D., therefore it is considered that Her Majesty ought to recover against the said C. D. the several penalties in the said information mentioned: but because it is unknown to the Court what penalties the said A. B. hath incurred, and because it is convenient that there be but one judgment for the penalties in the said information mentioned, therefore for the giving of the same against the said C. D. be stayed until the trial of the issue joined between Her Majesty's Attorney General and the said A. B. And whereas in the trial of the said issue so joined in a verdict of the jury in the day of A.D. 18 , the said A. B. was found guilty of the several offences, and each and every of them, in the said information mentioned. Therefore it is considered that the said A. B. and C. D. be convicted of the several offences in the said information mentioned, and that they be for their said offences within the several sums of money in the said information mentioned, amounting together to the sum of £ and that Her Majesty recover against the said A. B. and C. D. the said sum of £ . ~~It is made known, however that and use the sum of £ for Her Majesty's costs of suit, which said sums in the whole amount to £ .~~

The above form may be adapted with such alterations as may be necessary to meet the cases of Default or Judgment.

Form of Judgment of Informations upon Judgment given for the Crown in a matter of original Jurisdiction.

It is the duty of the Attorney General to file in the Court and have returned the

information

information to (The said being the)
the said returned to the Court's consideration of this Court a in writing alleging that there was error in law

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SCHEDULE C.

FORM No. 1.

Copy of Extent, &c. for Claimant, Nisi Prius Record, Roll, or Paper Book, may commence thus :

In the Exchequer.

The- day of in the year of our Lord 18 .
(The teste of the writ.)

Middlesex (or county) to wit. On the day and year above written a writ of Our Lady the Queen issued forth of this Court, in these words (then copy Writ, Return, Inquisition, Schedules, &c.)

The foregoing or similar introductory words may be applied to any other writ requiring enrolment.

FORM No. 2.

Copy of Transcript for Claimant, Nisi Prius Record, Roll, or Paper Book, may commence thus :—

In the Exchequer.

The day of in the year of our Lord 18 .
(The day transcript was filed.)

Middlesex (or county) to wit. On the day and year above written was filed in the office of Her Majesty's Remembrancer of this Court the following transcript [*here follows the transcript*].

FORM No. 3.

Nisi Prius Record on Scire Facias, Roll, or Paper Book, may commence thus :

In the Exchequer.

The day of , in the year of our Lord 18 .
(The teste of the writ.)

Middlesex (or county) to wit. On the day and year above written a writ of our Lady the Queen issued forth of this Court in these words:—"Victoria," &c.

FORM No. 4.

Form of Nisi Prius Record on Information.

In the Exchequer.

The day of , in the year of our Lord 18 .
(Date of information.)

Venue.—Her Majesty's Attorney General, on behalf of Her Majesty (as in the information), sues A. B., by virtue of a writ of [*sub-pœna*] issued out of this Court on the day of , in the year of our Lord 18 (*date of writ*), and gives the Court to

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 ~~~~~  
 REVENUE  
 CIVILIAN.

of making the entry on the roll, the Attorney General [*or* defendant, as the case may be.] says that there is error in the above record and proceedings, and the defendant [*or* as the case may be.] says there is no error therein.

## FORM No. 8.

*Note of Error in Fact.*

In the Exchequer.

The            day of            , in the year of our Lord 18   .  
 (The date of lodging note in error).

Her Majesty's Attorney General [*or* as the case may be.]

and

A. B.            in error.

The defendant [*or* as the case may be.] says that there is error in fact in the record and proceedings in this suit in the particulars specified in the affidavits herewith annexed.

Signed &c. [*by Attorney*] or  
 [*Solicitor of Department*].

## FORM No. 9.

*Satisfaction Warrant.*

To be endorsed by the Solicitor of the Department, and afterwards signed by the Attorney General.

In the Exchequer.

The            day of            , in the year of our Lord 18  
 [*when signed by Attorney General*].

Between Our Sovereign Lady the Queen [*or* Her Majesty's Attorney General, Informant],

and

A. B. defendant. And Sir            , Knight, Her Majesty's Attorney General, who prosecuted for Her said Majesty, acknowledges and confesses [*or* by deposition or exam.] that the sum of £            found due to Her Majesty from the said A. B. : [*or* by bond] that the sum of £            , the penalty of a certain bond given by the said A. B. to Her Majesty, bearing date the day of            A.D. 18   : [*or* by judgment] that a certain judgment entered against the said A. B. on the            day of            A.D. 18   for the sum of £            [            ] hath been satisfied to Her Majesty's use, and that therefore Her said Majesty's Attorney General will not proceed any further in the premises against the said A. B. touching the same.

*Endorsement.*

The within mentioned sum having been satisfied, I see no objection to the filing of this warrant, with the leave of the Attorney General.

C. D.  
 S. Rector of &c.



FORM No. 10.

*Form of Recognizance of Bail on Capias.*

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In the Exchequer.

Be it remembered, That A.B. of C.D. of and E.F. of come in their proper persons before the Honourable Sir , Knight, one of the Barons of Her Majesty's Court of Exchequer at Westminster, [*or before G.H., a Commissioner duly authorized for taking Special Bail in Her Majesty's Court of Exchequer at Westminster.*] on the day of in the year of our Lord one thousand eight hundred and , and jointly and severally acknowledge themselves to be indebted to Her present Majesty Queen Victoria, Her heirs or successors, in the sum of pounds.

£ .

Upon condition that if the said A.B. shall satisfy Her said Majesty all the penalties [*or, if for duties, the several sums of money*], sued for upon an information (*if information not filed, say to be*) exhibited against him before the Barons of this Exchequer by Her said Majesty's Attorney General for the forfeitures and offences [*or, if for duties, recovery of the several sums of money,*] in the said information mentioned, or otherwise, if the said A.B. shall render himself a prisoner in the Court here, then this recognizance of bail to be void, or else to be and remain in full force and virtue.

|                                 |   |      |
|---------------------------------|---|------|
| Taken and acknowledged at       | } | A.B. |
| the day and year above written. |   | C.D. |
| Before me,                      |   | E.F. |

FORM No. 11.

*Form of Recognizance of Bail in Error.*

In the Exchequer.

Be it remembered, That A.B. of C.D. of and E.F. of come in their proper persons before the Honourable Sir , Knight, one of the Barons of Her Majesty's Court of Exchequer at Westminster, [*or before G.H., a Commissioner duly authorized for taking Special Bail in Her Majesty's Court of Exchequer at Westminster.*] on the day of in the year of our Lord one thousand eight hundred and , and jointly and severally acknowledge themselves to be indebted to Her present Majesty Queen Victoria, Her heirs, or successors, in the sum of pounds.

£ .

Whereas the above named A.B. hath delivered a memorandum in writing to the Queen's Remembrancer of this Court, alleging that there is error in law in the record and proceedings upon the information exhibited against him therein by Her Majesty's Attorney General. The condition, therefore, of this recognizance is such, that if the said



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A.B. shall prosecute the proceedings in error with effect, and shall also satisfy and pay, if the said judgment of the said Court upon the said information shall be affirmed, or the proceedings in error discontinued by the said A.B., all and singular the sum or sums of money adjudged or to be adjudged upon the said judgment, and all costs and damages to be also awarded for the delaying of execution thereon, then this recognizance to be void, or else to be and remain in full force and virtue.

|                              |   |      |
|------------------------------|---|------|
| Taken and acknowledged at    | } | A.B. |
| the day and year first above |   | C.D. |
| written. Before me,          |   | E.F. |

## FORM No. 12.

Stamp 35s.

*Recognizance for Costs on Claim.*

In the Exchequer.

Be it remembered, That, A.B. of                      in the county of  
(the claimant), C.D. of                      , and E.F. of                      come in  
their proper persons before the Honourable Sir                      , Knight,  
one of the Barons of Her Majesty's Court of Exchequer at West-  
minster [*or before G. H., a Commissioner duly authorized for taking*  
*Special Bail in Her Majesty's Court of Exchequer at Westminster,*] on  
the                      day of                      in the year of our Lord one thousand  
eight hundred and                      , and jointly and severally acknowledge  
themselves to be indebted to Her present Majesty Queen Victoria,  
Her heirs or successors, in the sum of one hundred pounds.

£100.

The condition of this recognizance is such that whereas I.K., an  
officer of Excise, hath lately seized as forfeited to the use of Her said  
Majesty several parcels of                      which said                      was (*or*  
*were*) afterwards re-seized by L.M., and the property in the same is  
claimed by the above named A.B. who hath entered such his claim  
thereto in this Court. If therefore the said A.B., his heirs, execu-  
tors, or administrators, shall pay or cause to be paid to the Receiver  
General of Inland Revenue all such costs as shall be occasioned by the  
said claim, to be taxed by Her Majesty's Remembrancer of this Court,  
in case the said                      or any part thereof shall hereafter be  
adjudged forfeited, then this recognizance to be void or else to be and  
remain in full force and virtue.

|                              |   |      |
|------------------------------|---|------|
| Taken and acknowledged at    | } | A.B. |
| the day and year first above |   | C.D. |
| written, Before me,          |   | E.F. |

## FORM No. 13.

Stamp 35s.

*Recognizance for Costs on Appeal to Privy Council.*

Be it remembered, That A.B. of                      comes in his proper  
person before the Honourable Sir                      , Knight, one of the Barons .







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## Exchequer Reports.

TRINITY VACATION, 24 VICT.

MARSACK v. WEBBER.

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July 5.

**D**ECLARATION for money paid.—Plea: Never indebted.

At the trial, which took place before *Martin*, B., without a jury, at the Middlesex Sittings in Easter Term, it appeared that the action was brought to recover 56*l.*, being a moiety of the sum of 112*l.* paid by the plaintiff under the following circumstances.

By an agreement of reference, dated the 8th of July, 1857, a certain action, and all matters in difference between the plaintiff and the defendant, were referred to the award of G. Goodwin, and G. B. Childs, or in case of their disagreement to such person as they should by a memorandum in writing appoint, the costs of and incident to the reference and award, including therein such costs as might be taxed by the officer of the Court in the action, to abide the event of the arbitration or umpirage. On the 10th of October, 1857, upon a summons at Chambers, *Channell*, B., on hearing counsel on both sides, ordered "that John Raymond, Esq., barrister at law, be appointed an umpire therein, pur-

Where two parties employ an arbitrator, and one pays the arbitrator's fees to enable him to take up the award, (there being no event of the award to entitle either party to costs), the party so paying is entitled to recover from the other a moiety of the sum paid as money paid to his use.



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suant to the Common Law Procedure Act, 1854." On the 1st of March, 1859, the umpire made his award, and thereby awarded that the defendant should pay to the plaintiff 156*l.* 18*s.* in respect of certain accounts; and that as to certain false and malicious representations, alleged to have been made by the defendant to the plaintiff, that the defendant was not guilty. Notice having been given to both parties that the award was ready to be delivered to them on payment of the fees, amounting to 112*l.*, the plaintiff paid that sum in order to take up the award.

On these facts the learned Judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit, or verdict in his favour.

*Lush*, in Easter Term, having obtained a rule nisi accordingly,

*Hance* now shewed cause.—Under the order of reference and award made in pursuance of it, neither party is entitled to the costs of the reference and award. That was decided by the Court of Queen's Bench in this case: *In Re Marsack and Webber (a)*. The plaintiff, however, having paid the whole of the umpire's charges in order to take up the award, is entitled to recover a moiety thereof from the defendant. There are several dicta which shew that the parties to a reference are jointly liable to the arbitrator. If so, in this case the umpire might have maintained an action against both the plaintiff and the defendant. In *Bates v. Townley (b)*, by agreement between the plaintiff and the defendant certain differences between them were referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The arbitrators, after finding a sum of money due from the defendant to the plaintiff, awarded that the costs

(a) 29 L. J., Q. B. 109.

(b) 2 Exch. 152.



of the reference and award, including compensation to the arbitrators, should be borne as follows: that is to say one moiety thereof by the plaintiff, and the other moiety thereof by the defendants. The plaintiff took up the award, and paid the whole costs of it, and it was held that he could not recover a moiety of the sum paid by him as money paid for the use of the defendants. But that was because the award was bad. *Parke*, B., in delivering the judgment of the Court intimated that if the award had been good the plaintiff might have recovered. He said "the plaintiff must shew that both the parties became jointly liable to the arbitrators for the sum that was paid to them," &c. Again, "this contract of the two parties is evidence, by their own admission, that the arbitrators were to be paid for their trouble, and might be used for that purpose if the arbitrators had to sue the parties for their services." \* \* \* "Both the parties having jointly employed the arbitrators, would, as between them and the arbitrators, be jointly liable to pay a reasonable compensation." In *Re Coombs (a)*, *Parke*, B., said:—"No doubt an arbitrator has a lien upon the award for his services, or, perhaps, he might maintain an action for work and labour; and as to the supposed difficulty to which the party may be subjected who has taken up the award and paid the money, I am inclined to think that he might maintain an action for money had and received, on the ground that the payment was not voluntary." [*Bramwell*, B.—In agreeing to submit their differences to arbitration, both parties must have contemplated that the award would be taken up.]

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*Lush*, in support of the rule.—In the present case there was no evidence of any promise to pay the umpire. The

(a) 4 Exch. 839.



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award might have been taken up by either party. When the plaintiff took it up, he did so for his own purposes, and must be deemed to have taken his chance of being reimbursed. The Court of Queen's Bench have held that there was no event of this award entitling the plaintiff to the costs of it. [*Martin*, B.—The umpire has done work for both the plaintiff and the defendant jointly; therefore, *prima facie*, he was entitled to be paid. Does it not follow that there was a debt jointly due by these two persons to a third, which has been paid by one?] It is submitted that it is not correct to say that the fee paid to the umpire was a debt. A barrister may sue for his fees, if there has been an express promise to pay them: *Hoggins v. Gordon* (a), *Egan v. The Guardians of the Kensington Union* (b); but not otherwise. In *Virany v. Warne* (c), Lord *Kenyon* ruled that this doctrine applied to the case of an arbitrator suing for his fees. [*Channell*, B.—Suppose it had been expressly agreed that all matters should be referred to arbitration and that the arbitrator or umpire should be paid, could it be contended that the plaintiff could not sue?] The agreement regulates the rights of the parties; but here that which has taken place has not been provided for. [*Channell*, B.—The agreement of reference contemplates that the arbitrator shall be paid; it provides how the costs are to be borne by the parties.] *Bates v. Townley* (d) does not shew that arbitrators have a right of action for their fees. In the present case each party must bear his own costs, and neither party can recover from the other any part of the expenses he has voluntarily paid: *Yates v. Knight* (e), *Gribble v. Buchanan* (f). The fee paid to the umpire is a part of the expenses of the reference. The observations of *Parke*, B.,

(a) 3 Q. B. 466.

(b) 3 Q. B. 935, note.

(c) 4 Esp. 46.

(d) 2 Exch. 152.

(e) 2 Bing. N. C. 277.

(f) 18 C. B. 691.



in *Bates v. Tounley* (a), and in *Re Coombs* (b), must be taken to refer to a case where there is an express promise to pay the arbitrator. [*Martin*, B.—Surely, if the parties place before an arbitrator an agreement of reference, stating that the expenses of the reference and award are to abide the event of the arbitration, that is an express representation to the arbitrator that he shall be paid.] That cannot alter the nature of the employment, if in point of law it is merely honorary. [*Channell*, B.—Suppose an arbitrator is asked to act upon a submission which shews that the arbitrator is to be paid, does not that amount to an express contract that he shall be paid?]

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*Cur. adv. vult.*

MARTIN, B., now said.—In this case there was a reference of all matters in difference to arbitration, the costs of the reference and award to abide the event. After the argument of a rule obtained by one of the parties for the taxation of his costs, the Court of Queen's Bench was of opinion that there had been no *event* on which such costs could be taxed. One of the parties, however, has paid a considerable sum to the umpire, on taking up the award. It was suggested that his right to recover a moiety was governed by the case in the Court of Queen's Bench. But we are of opinion the cases are distinguishable. The costs, under the circumstances which have taken place, are not provided for by the agreement of reference. Then it was contended that the payment to the umpire was a voluntary payment; not such a payment by compulsion as would enable one party who had paid the whole to recover a moiety from the other; and that the right of the umpire to his fees was not a legal debt. Without going into that

(a) 2 Exch. 152.

(b) 4 Exch. 839.



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question, we think that when two parties agree to employ an arbitrator, and one pays a sum of money to take up the award, in reason, justice and law he is entitled to recover from the other a moiety of the sum so paid. Therefore, the rule to enter a nonsuit must be discharged.

Rule discharged.

July 6.

THOMAS JOHNSON v. SIMCOCK AND JACKSON.

A testator devised as follows:—

"As to my real estate if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real property to my brother J. and D. H. equal between them, &c. But in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs, assigns and executors for ever."

The daughter having attained twenty-one, married, and settled the property in question on her husband, but died without

ever having had a child.—*Held*, that on attaining twenty-one she took an estate in fee by descent, and that therefore the devise to J. and D. H. never took effect: Per *Pollock*, C. B., *Bramwell*, B., and *Channell*, B., dissentiente *Martin*, B.

THIS was an action of ejectment to recover possession of a farm and lands called Wormlow Cross.

At the trial, before *Bramwell*, B., at the Spring Assizes at Stafford, it appeared that Thomas Johnson, the uncle of the plaintiff, being seised in fee of the said farm and lands, made his will as follows:—

"I give and bequeath to my wife, Hannah Johnson, the sum of 20*l.* yearly out of my real estate; likewise I give to my wife the interest of 400*l.* during her natural life, in case she does not marry; but if she should marry, then to have only the interest of 400*l.*, and not any of the 20*l.* above mentioned. And should my daughter, Margery Johnson, happen to die without issue, then I will that the 400*l.* be at my wife's disposal in case she survives my daughter; but should my wife happen to die before my daughter, then the said 400*l.* to be at my daughter's disposal. \* \* \*

Likewise I will, in case my daughter should marry during my wife's life, that my daughter shall give to my wife 30*l.* to buy her household furniture; and in case my daughter should have no lawful issues (a), after her death

(a) Sic.



"I will that my property that shall be remaining to return to my relations, &c. The remainder of my personalty I leave to my daughter's disposal, if she lives to maturity. As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property to my brother, John Johnson, and Dorothy Harris, equal between them, they paying all the legacies and expenses as before mentioned; but in case my daughter shall have lawful issue, I leave the whole of my property, real and personal, to her and her heirs, assigns and executors for ever, provided she pays to my wife and my nephew Thomas Johnson, and my brother John Johnson, their legacies mentioned at the beginning of this my will," &c.

The testator died in 1812, leaving John Johnson and Dorothy Harris surviving him. Dorothy Harris died in 1814; John Johnson died in 1838, leaving the plaintiff his eldest son and heir at law. Margery Johnson, who was the only child of the testator, died in 1849 without issue.

The defendant's case was, that after Margery Johnson came of age, she executed a disentailing deed, and the property was afterwards, upon her marriage with the defendant Jackson, conveyed to trustees, under whom the defendants claimed.

Upon these facts the learned Judge directed a verdict for the plaintiff, giving leave to the defendants to move to enter a nonsuit.

*Whateley*, for the defendant Jackson, in Easter Term obtained a rule nisi to enter a nonsuit, on the ground that by the true construction of the testator's will the property vested in Margery, his daughter, when she attained the age of twenty-one years, and passed by the settlement made on her marriage.

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*M'Mahon* and *J. E. Davis* shewed cause (a).—The intention of the testator was that if Margery Johnson died under twenty-one years of age, or had no lawful issue, the estate should go to the testator's brother John Johnson, and Dorothy Harris, with a proviso that if Margery had a child, she should take an estate in fee. There is no devise of any estate for life to her, but she took an estate in fee by descent, subject to the executory devise over in the event of her dying without ever having had a child. The cases of *Weakley d. Knight v. Rugg* (b), and *Doe d. Barnfield v. Wetton* (c), cited in Jarman on Wills, vol. 1, p. 473, 2nd ed., shew that there is nothing to give to Margery Johnson an estate tail, either expressly or by implication. *Gardner v. Sheldon* (d) shews that, where an estate is devised over after the death of the testator, upon condition, the heir takes by descent until the condition is performed. Therefore this case does not fall within the terms of the rule as stated in Jarman on Wills, vol. 1, p. 422, which applies to cases where the testator begins by devising his real estate to the party whose estate is to be defeated on the contingency taking effect. *Soullé v. Gerrard* (e) was commented upon by Lord Cranworth, C., in *Grey v. Pearson* (f), who points out that the construction adopted in that and other cases has been for the purpose of preserving the estate, which would otherwise go over, in case of the death of the first taker under age, leaving issue. But no such reason for changing the natural meaning of the words exists in the present case. In *Mortimer v. Hartley* (g), the testator, after giving estates tail to his children John and Anne, proceeded as follows:—

(a) In Trinity Term, June 7.  
 Before Pollock, C. B., Martin, B.,  
*Bramwell*, B., and *Channell*, B.

(b) 7 T. R. 322.

(c) 2 Bos. & P. 324.

(d) Vin. Ab. Devise (L. 2),  
 pl. 9.

(e) Cro. Eliz. 525.

(f) 6 H. L. 61. 79.

(g) 6 Exch. 47.



"If it should please God to take John and Anne under age, or without leaving lawful issue, I give and bequeath to my brother Joseph Westerman, and his heirs for ever, all these cottages," &c. The Court of Exchequer held that "the disposition of the Courts should always be to abide by the words of a will, and read them in their ordinary grammatical sense;" and accordingly they refused to change "or" into "and" for the purpose of effecting the conjectured intention of the testator. That opinion was approved and acted upon by Vice Chancellor *Knight Bruce* (a). In *Hilliard v. Gennings* (b), Lord *Holt* denied the case of *Soules v. Gerrard* (c) to be law. In *Woodward v. Glasbrook* (d), where one devised several parcels of land to his several children in tail, and if any of them die before twenty one, or unmarried, such child's part to go to the surviving children, Lord *Holt* held that, one child dying unmarried, though he attained the age of twenty one, his share went over to the survivors. The Courts will not change "or" into "and," where such a change would lead to intestacy. In the present case, if "or" be changed into "and," neither the executory devise over, nor the conditional gift of the fee to the daughter, would take effect. It would, therefore, in the events which have taken place, violate the expressed intention of the testator. It may be doubted whether "lawful age" is to be construed as meaning "full age," that is, twenty-one. A woman is of lawful age to contract a marriage at twelve years old, and the testator may have meant to say, "if my daughter never arrives at womanhood or if having arrived at that age she dies without ever having had a child, the estate is to go over."

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*Whateley* and *Manley Smith*, in support of the rule.—The

(a) 3 De Gex & S. 316.

(c) Cro. Eliz. 525.

(b) 12 Moo. 276; see 2 Vern.

(d) 2 Vern. 388.



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present case falls within the rule thus stated in Jarman on Wills, vol. 1, p. 422 :—" By far the most numerous class of cases exhibiting the change of the testator's words are those in which the disjunctive, "or," has been changed into the copulative, "and," and vice versâ. It is obvious that these words are often used oally without due regard to their respective import; and it could not be difficult to adduce instances of the inaccuracy even in written compositions of some note. It is not, therefore, surprising that this inaccuracy should have found its way into wills. Accordingly, we find that the Courts have often been called upon to rectify blunders of this nature, &c. It has long been settled that a devise of real estate to A. and his heirs, or, which would be the same in effect, to A. indefinitely, and in case of his death under twenty-one, *or* without issue, over, the word "or" is construed "and;" and consequently the estate does not go over, unless both the specified events happen." Here the testator's daughter, Margery Johnson, took an absolute vested interest on attaining the age of twenty-one years. Suppose she had died under that age, leaving children, it is impossible to suppose that the testator did not mean that the property should go to her children. To carry out the testator's intention, the word "or" must be read "and." Unless "or" be construed "and," the estate would go over to the testator's brother in either of the events specified. In *Eastman v. Baker* (a) the words were: "I give unto my daughter Jane all the right, &c., I now have in a certain messuage to her and her heirs; but if my daughter shall happen to die, and not attain the full age of twenty-one years, *or* having no such issue, then I give and devise the same premises to my dear wife." *Mansfield*, C. J., in delivering the judgment of the Court, said: "The question is whether 'or' in this place means 'and.' According to *Fairfield v. Mor-*

(a) 1 Taunt. 174. 182.



*gan* (a) and the other cases cited, it must mean 'and;' because, if it does not, it follows that, upon the contingency of the daughter dying, having issue, but not having attained the age of twenty-one years, the estate would pass over from her children, which could never be the testator's intention." In *Soulle v. Gerrard* (b) there was a devise to one of four sons and his heirs for ever, and if he die within age or without issue, to his three other sons jointly. The devisee had issue, a daughter, and died within age; and the Court held that he took an estate tail. In *Price v. Hunt* (c) there was a similar limitation, and the Court held that the grammatical sense of the word "or" might be rejected, and the word read as if it were "and." *Walsh v. Peterson* (d), *Barker v. Suretees* (e), and *Right, lessee of Day, v. Day* (f), are authorities in favour of this mode of construing the devise.

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The learned Judges differing in opinion, the following judgments were now delivered.

MARTIN, B.—This is an action of ejectment which was tried before my brother *Bramwell*, at Stafford, when he directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. A rule was granted for this purpose, and cause has been shewn against it. The question depends upon the will of Thomas Johnson, dated the 9th of March 1810. He had an only child, a daughter, *Margery Johnson*; after his death she married, and died some short time ago, never having had a child. After she came of age, and during her marriage, she and her husband executed a disentailing deed, and the defendant claims

(a) 2 New Rep. 38.

(b) Cro. Eliz. 525.

(c) Pollex. 645.

(d) 3 Atk. 193.

(e) 2 Str. 1175.

(f) 16 East, 67.



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title under it, and if she had either an estate in fee simple absolute, or an estate tail in the real property devised, the defendant's title is good, and he is entitled to have this rule made absolute. The plaintiff claims title under John Johnson, the brother of the testator, named in the will, and his contention is, that upon the events which have happened he became entitled to a moiety of the property upon the death of the daughter. The duty of Courts of law, in construing wills, is to give effect to the intention of testators, as expressed by them in writing. Very many rules have been enunciated to aid the Courts in giving the proper construction; but their primary duty is to read the will itself and endeavour to ascertain what its words express taken in their plain, natural, ordinary, grammatical sense. It plainly appears from the present will that a principal object which the testator had in contemplation was, that in the event of his daughter having issue, the great bulk of his property should go to her. He also expresses an intention that, in the event of her dying without issue, what then remained of his personality should (as he expresses it) return to his relations.

The first part of the will relates to the personality. The devise as to the property in question is as follows:—"As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real property to my brother John Johnson and Dorothy Harris equal between them, they paying all the legacies before mentioned: but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her, and her heirs, assigns and executors for ever."

It was agreed on behalf of the defendants, first, that by the legal operation of this will, the daughter took an estate in fee simple, by devolution conditional: that the word "or"



must be read "and;" that the devise to the brother John Johnson and Dorothy Harris were executory devisees in the event of the daughter dying under age, and without having had issue; and that upon her attaining full age, her estate in fee simple became absolute, and that, if the will were construed otherwise, the consequence would follow that in the event of the daughter dying under age, and leaving a child, the property would go to the brother John Johnson and Dorothy Harris, in exclusion of the daughter's child, which would be contrary to the plainly expressed intention of the testator. Or, secondly, that the daughter took under the will an estate tail by implication. If either of these positions be maintainable the defendant's title would be good. If the will had stopped at the devise to John Johnson and Dorothy Harris, there would have been much weight in the argument on his behalf. But I think we are bound by law to read the whole devise together, and the next sentence is to the express effect that in case the daughter should have lawful issue the whole of his property was to go to her and her heirs for ever. This shews, first, that the estate devised to the daughter was not an estate tail; for the devise is, that, upon issue of her body being born, the estate should be to her and her heirs for ever, that is in fee simple absolute. Secondly, it shews that the testator expressly provided for the case of issue being born of his daughter, whether it was born when she was under age or above it. This displaces the argument as to the child or children being deprived of the inheritance upon the death of the daughter under age. I therefore think there is nothing to justify us in altering the words of the testator, and reading "or" for "and;" and the true legal result upon the intention of the testator expressed by him, in writing, in his will, seems to me to be, that upon his death an estate in fee simple by descent vested in his daughter, but conditional; that on the event of her having

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a child the condition would be satisfied, and her estate would be one of fee simple absolute, but on the event of her dying without ever having had a child there was a valid executory devise in fee to the brother, John Johnson, and Dorothy Harris as tenants in common. This construction is in accordance with the plain, ordinary, grammatical construction of the words used, and gives effect to them without alteration; and, were it of importance, such a disposition of property is, in my judgment, perfectly reasonable, that is to say, to an only child absolutely in fee simple provided she has a child, but if she dies without ever having had one, then to the testator's own relations.

CHANNELL, B.—I have to deliver the judgment of the Lord Chief Baron, my brother *Bramwell* and myself.

The question in this case is whether “or” is to be read “and,” in that clause of the will under which the plaintiff claims, and which is as follows:—“As to my real estate, if my daughter dies before she arrives at lawful age, or have no lawful issue, then I leave my real and all my other property,” &c. Now this word “or” should have its usual signification unless there is some reason making it necessary to read it otherwise. It seems to us that there is such a reason. We may observe that there is probably less difficulty in substituting “and” for “or” than for any other change of language. Instances of the necessity for doing so are numerous, the mistake of using one of those words for the other being one which persons very often do, and easily may, make. If in this case the words had been “does not arrive at legal age, nor have lawful issue,” the phrase would have meant what the defendant says it means now, and yet the disjunctive conjunction would be used. Still, however easy it may be to suppose the testator made a mistake, a reason must be given for holding he did so. It seems



to us there is such a reason. Following the devise in question is this:—"but in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her, her heirs, assigns and executors for ever." Now in that event, viz., his daughter having lawful issue, though she dies before she arrives "at lawful age," she takes the estate in fee, and John Johnson and Dorothy Harris do not take at all. It is clear, therefore, that if she has lawful issue the word "or" cannot be so read, and must be read "and." But it is said, that if she has no lawful issue, then "or" may be read "or;" but that is (in truth) to say that the words, "if my daughter die before she arrives at lawful age," have no effect, and might be left out of the will, which, according to this construction, means if she has issue she takes in fee, though she does not attain her age; and if she has not issue, she does not take in fee, though she does attain it: in other words, that her attaining her age is immaterial. This construction would be more obvious if the devise to her came first, viz., I give to her and her heirs for ever, if she has issue; but if she has no issue, or dies under twenty-one, &c. In that case "or" must be read "and;" and the effect of the will would be: "If she attains twenty-one, she will take by descent, with a power to alienate; if she has children, I give to her: but if neither of those events happen, I give to my brother and sister," that is, I give to them if she does not attain an age to alienate, nor leave issue to succeed her. Nor do we think this construction contrary to any intention of the testator, either presumably or to be collected from the will. It may very well be that the testator meant that if his daughter attained twenty one, she should have the estate in fee, though she has no children. Of course, it would be a greater benefit to her and enable her to place herself better in life. It is true, he does not say so in words in the devise

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to her; but it may be he did not think it necessary. He may have thought it necessary to say that if she had lawful issue, though she died under twenty-one, she should take in fee; and that his brother and sister should not, and that they should only take if she died under age and without issue. On these grounds we think the rule should be made absolute. (See *Fairfield v. Morgan* (a), *Right, lessee of Day, v. Day* (b)).

Rule absolute.

(a) 1 Taunt. 174.

(b) 16 East, 67.

Nov 21.

FRASER and Others, Assignees of JAMES MCCLURE, a Bankrupt, v. ELIAS LEVY and SIMON SAMPSON.

**TROVER** for silks, calicoes and other goods. Plea.—Not guilty, and not possessed.

At the trial before Rindburn, J., at the Spring Assizes at Liverpool, it appeared by the evidence for the plaintiff, that James McClure, the bankrupt, began business on his own account on the 1st of August, 1834, and carried it on till the 1st of September in the same year, having succeeded in his trade. During this period the bankrupt bought goods, to a very large amount from various persons on credit, and sold them to the defendants for ready money. There were eight or nine sales to the defendants. The defendants generally bought all the goods which the bankrupt had in his possession at the time within a few pounds worth. On the 1st of August, while the bankrupt was sick in his mind the money was advanced to the defendants being about ten or eleven hundred pounds. The defendant Sampson was introduced to the bankrupt as a person who would do business

It is a matter of course that the plaintiff is entitled to recover the value of the goods as at the time when they were sold, and the defendant is bound to pay the value of the goods as at the time when they were sold. The plaintiff is entitled to recover the value of the goods as at the time when they were sold, and the defendant is bound to pay the value of the goods as at the time when they were sold.



for ready money, and the bankrupt sold him a parcel of calicoes and other goods at a very low price. On the 26th of August the bankrupt bought from one W. Bryan 200 pieces of grey shirtings, which were invoiced to him at 217*l*. 4*s*. 1*d*. These the bankrupt sold to the defendants within a day or two afterwards, and invoiced them as "job," at 170*l*. The bankrupt stated that this invoice was made out by the direction of the defendants; but the sum actually paid by them was little more than half of that mentioned in the invoice. On the 2nd of September the defendant Sampson went to the bankrupt and asked: "Can you not get me some silks?" The bankrupt purchased some silks of Messrs. Smith, and of Joynson and Co., which were invoiced to him at prices amounting to 384*l*. 15*s*. The defendants paid the bankrupt 150*l*., and by their direction a sham invoice was made out to the defendants, stating the price to be 338*l*. The defendant Sampson came to the warehouse several times on the same day, and asked if the silks had come in. All the transactions between the bankrupt and the defendants were of a similar character.

For the purpose of shewing the intent to become bankrupt and defraud his creditors, evidence was given that M'Clure had sold goods to other persons, in some cases in the presence of the defendant Sampson, under circumstances similar to those under which the sales to the defendants took place. It was further shewn that the goods invoiced to the defendants as "job," that is unsaleable or damaged goods, were perfect, and that a reduction of 5 per cent. from the cost price would have insured an immediate sale in the market.

The defendants contradicted the evidence for the plaintiff, and, in particular, swore that the invoices to them represented the price actually paid.

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The plaintiff's counsel, at the instance of the learned Judge, elected to rely on the transaction of the 26th of August as an act of bankruptcy.

The learned Judge told the jury that if a sale or other disposition of the property of a trader takes place, at ever so ruinous a sacrifice, it is no act of bankruptcy if done for the purpose of providing funds to carry on the business, and the creditors are not delayed or defrauded of the money so substituted for the goods. Even if a trader gets goods on credit for the express purpose of immediately selling them for ready money, to carry on his business, it is not fraudulent in such a sense as to be an act of bankruptcy. But if a trader raises money by selling his goods at an under value, not with the intention, however hopeless, of making a struggle to carry on his business, but in contemplation that he will stop payment, and for the purpose of cheating his creditors, that is an act of bankruptcy. And if, in committing this act of bankruptcy, he sells at a price, whether ruinously or not ruinously low, to another, who at the time has notice, knowing, either from express information or the nature of the transaction, that the debtor is selling, not in order to make a struggle to carry on his business, but with a fraudulent intention, the sale is void as regards the purchaser, and the assignees may recover the goods from him. The learned Judge then asked the jury whether, under all the circumstances, the sale was such an act of bankruptcy as defined by him? And whether the defendants, at the time they gave the money for the goods, were aware that the sale was such as to make it an act of bankruptcy? What did the bankrupt mean on the 26th of August? And what did the defendants know he meant? His lordship pointed out that it was clear the defendants knew that the bankrupt was disposing of his goods on ruinous terms; but it did not follow that they knew he was raising money for any other



purpose than that of struggling to carry on his business; and told the jury that if they thought that the bankrupt, on the 26th of August, was contemplating stopping business and defrauding his creditors, it was an act of bankruptcy; and if the defendants knew that on the 26th of August, the verdict should be for the plaintiffs; if not, for the defendants. The jury found a verdict for the plaintiffs.

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*Overend*, in Easter Term, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence, against which

*Knowles* and *Wheeler* now shewed cause.—The facts shewed that the bankrupt sold the goods, not for the purpose of carrying on his business, but simply to put the money into his pocket, and place it out of the reach of his creditors. The learned Judge admitted the authority of *Lee v. Hart* (a).

*Overend* and *Milward*, in support of the rule.—The learned Judge misdirected the jury in telling them that if a trader sells goods below their value, in contemplation that he will stop payment, and for the purpose of cheating his creditors, it is an act of bankruptcy. In *Baxter v. Pritchard* (b) it was held that an assignment by a trader of his whole stock, with intent to abscond from his creditors and carry off the purchase money, is not an act of bankruptcy when the purchaser pays a fair price, and is ignorant of the trader's design. In *Lee v. Hart* (a), *Parke*, B., said: "There may be a transfer of goods by sale, with a fraudulent intent on the part of the trader, which is, nevertheless, a valid transfer. Even when the trader intended, on a particular sale, to run away with the price and cheat his creditors, such sale is not an act of bankruptcy. But if the purchaser is a party to that intention, then it would be a

(a) 10 Exch. 555; 11 Exch. 880.

(b) 1 A. &amp; E. 456.



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fraudulent transfer, within the statute." [*Martin, B.*—It may be an act of bankruptcy, though, if the purchase be bonâ fide and without notice, the purchaser may be protected.] The cases shew that it is no act of bankruptcy if the buyer has no notice that the sale is fraudulent: *Harwood v. Bartlett (a)*, *Cook v. Culdecott (b)*, *Bentiff v. Garnett (c)*. The verdict here may have proceeded on the ground that the jury thought themselves warranted in finding for the plaintiff, without finding that the defendants had notice of the fraudulent intention of the seller.

MARTIN, B.—We are all of opinion that the rule must be discharged. (After going through the facts and shewing that the verdict was not against the evidence, his lordship proceeded):—"The 12 & 13 Vict. c. 106, s. 67, enacts that if any trader, liable to become bankrupt, shall make "any fraudulent gift, delivery or transfer of any of his goods or chattels" with intent to defeat or delay his creditors, such trader shall be deemed to have thereby committed an act of bankruptcy. This, no doubt, is a re-enactment of the old provisions on the subject, and we must be bound by the decisions in construing it. It was contended by the defendants' counsel that in order to make the sale of goods an act of bankruptcy the buyer must be a party to the fraud. If I were to put a construction on the statute, I should think that the fraud pointed at is the fraud of the trader, and that what passes in his mind is the real criterion whether the sale is an act of bankruptcy or not. But it is not necessary to give an opinion as to the case of *Baxter v. Prichard (d)*, because the summing up gives full effect to it;—the learned Judge expressly told the jury to find for the defendants unless they thought that the defend-

(a) 6 Bing. N. C. 61.  
(b) Moo. & M. 522.

(c) 1 C. & K. 326.  
(d) 1 A. & E. 456.



ants were aware of the fraudulent intent of the bankrupt. The case of *Lee v. Hart* (a), as it appeared when tried before me, was very different to the present. It was no more than this—Peters, a needy man, was selling goods, the purchaser higgling and dealing as hard as he could.

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BRAMWELL, B.—It is clear that the question left by the learned Judge to the jury was a proper one. Even if he misstated the law, in saying that there might have been an act of bankruptcy though the defendants had no notice of the fraud of the bankrupt, that is no misdirection. I am not sure that the case of *Baxter v. Prichard* (b) is not absolutely correct. It may be that, to make a fraudulent transfer by sale, both the buyer and seller must be parties to the fraud.

CHANNELL, B.—I agree that the rule must be discharged. I do not dissent from any of the authorities which have been cited, and I agree with the defendants' counsel in thinking that they would be applicable if the summing up of the learned Judge was open to criticism on the point. The effect of what he says is, if a trader turns his goods into money with the intention of getting them out of the creditor's reach, it is an act of bankruptcy; and if the purchaser had, at the time, notice of the intention, the sale would be void. If the words "it is an act of bankruptcy" had been left out, or inserted after the word "intention," no objection could have been made to the ruling. However, after having described what would constitute an act of bankruptcy, he tells the jury to find for the defendants unless they are satisfied that the defendants were aware that the transaction was such as to be an act of bankruptcy.

Rule discharged.

(a) 10 Exch. 555; 11 Exch. 880.

(b) 1 A. & E. 456.



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June 22.

CLEAVE v. HARWAR.

Where, upon the winding-up of a Joint Stock Bank, which was also adjudicated bankrupt, a contributory, against whom judgment had been signed on a scire facias, effected a compromise and obtained a certificate under the Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78), the Court stayed all further proceedings on the judgment without imposing any terms.

*BEASLEY* had obtained a rule calling on the plaintiff to shew cause why satisfaction should not be entered on the roll, or why all further proceedings should not be stayed.

The plaintiff had proceeded by scire facias against the defendant to recover the sum of 123*l.* 11*s.* 4*d.*, being the amount of a judgment debt due from the Royal British Bank, of which the defendant was a shareholder, and on the 28th of March, 1857, signed judgment. Upon the winding-up of the Royal British Bank the defendant was placed on the list of contributories, and in order to be released from the claims of the creditors he effected a compromise under the Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78). The compromise was with the authority and consent of the official manager and the official liquidator of the Royal British Bank, and of the assignees thereof; and was confirmed by *Kindersley*, V. C., the Judge charged with the winding-up of the Bank, and also by the Commissioner in bankruptcy. The defendant had paid 489*l.* 1*s.* 6*d.* upon the compromise. On the 30th of April, 1858, the defendant obtained the certificate of *Kindersley*, V. C., that such compromise was effected and that the defendant was released from all liability in respect of the debts of the Royal British Bank. No execution had issued on the judgment against the defendant. An application similar to the present had been made to *Wilde*, B., at Chambers, who referred the matter to the Court.

*Joyce* shewed cause, in Trinity Term (June 11).—This case is not within the terms of the "Joint Stock Com-



panies Winding-up Amendment Act, 1857." That Act applies only to the debts and liabilities of the Company. A scire facias is a proceeding against the defendant on his personal responsibility. The first section provides for cases in which an order has been made for the dissolution or winding-up of the Company. The second section applies to cases where the Company has been declared bankrupt, and no winding-up order has been made. That section provides that the certificate shall operate "in discharge of any action, execution, or other proceeding by any creditor whose debt or claim is by law proveable under such bankruptcy;" but a judgment upon a proceeding by scire facias against a shareholder could not be proved under the bankruptcy. [*Pollock*, C. B.—The fifth section preserves the rights and remedies of creditors against persons who were shareholders at the time the debts were contracted.] That remedy would not apply to the costs of the proceeding by scire facias. The seventh section also shews that the legislature was dealing with the debts and liabilities of the Company and not of the individual shareholders, for it provides that after the creditors have been called on to appoint a representative, "no such action as is mentioned in the 73rd section of the 'Joint Stock Companies Winding-up Act, 1848,' shall be commenced or proceeded with, otherwise than for the purpose of making the Company bankrupt, nor shall any execution or scire facias be issued or proceeded with against the person, property, or effects of any member for the time being or any former member." [*Channell*, B.—It does not absolutely prohibit proceedings, but only those commenced without leave of the Court of Bankruptcy or a Judge or Master. The eighth section would seem to shew that the plaintiff cannot proceed with this scire facias without such leave.] If the construction of the statute is doubtful the Court will not decide upon motion, but leave the defendant to his auditâ querelâ.

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*Beasley*, in support of the rule.—The intention of the legislature was, that compromises made by a shareholder with the creditors of a Joint Stock Company should operate as a release of the shareholder from all liability to those creditors. The second and third sections may be construed together. The second is retrospective; and it empowers the assignees (who by the first section are the representatives of the creditors) to accept a sum in satisfaction and discharge of the liability of the shareholders to the debts of the Company. By the third section the representatives may make any compromise they think fit, "whether for the discharge and satisfaction of the liability of all and every the shareholders and members, or any or either of them, to the debts and liabilities of such Company, or otherwise." The representatives have control not only over the individual creditors but over all proceedings in and about the winding-up of the Company: *In re The London and Eastern Banking Corporation* (a). The scire facis is only a process for the purpose of obtaining execution against the defendant upon the judgment against the Company. The defendant is as much a party to that judgment as if he had been sued by name. The certificate operated as an absolute release of the judgment, and therefore it is compulsory on the Court to enter satisfaction on the roll: *Cotton v. Kerne* (b). [*Pollock, C. B.*—There the defendant having been in custody under a writ of ca. sa., his discharge was satisfaction of the judgment, so that no order execution could issue against his person, land, or goods. Here we can only stay the proceedings or leave the defendant to his writ of *habeas corpus*.] The seventh section, which saves the rights of creditors who have actually levied execution, shews by implication that the plaintiff has no right to proceed in this case. The facts of the scire

(a) 12 Decc. & J. 200.

(b) 1 Q. B. N. S. 136.



*facias* must be considered as included in the sum paid on the compromise. [Channell, B.—The words of the second section are very large, viz., that the certificate “may be pleaded *and used* in bar and in discharge of any action, execution, or other proceeding by any creditor,” &c.]

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POLLOCK, C. B.—We are all disposed to give the fullest effect to the provisions of this statute. There is no doubt that the defendant is entitled to relief; and the only question is whether any and what terms ought to be imposed on him.

*Cur. adv. vult.*

BRAMWELL, B., now said.—In this case Mr. *Beasley* had obtained a rule to enter satisfaction on the roll or stay the proceedings. It was an application by a shareholder in the Royal British Bank, who had paid a sum of money in discharge of his liability, and obtained a certificate under the “Joint Stock Companies Winding-up Amendment Act, 1857.” At the time of the argument we thought the case within the statute, and now we are clearly of that opinion. It seems to us that the Act was intended to comprehend cases both where there has been a bankruptcy and where there has not. The difficulty is to a great extent attributable to the difference in the wording of the statute where there is a bankruptcy and where there is not, and where the bankruptcy is before the winding-up and where it is afterwards—a difference arising from the necessity of providing representatives of creditors, the assignees being the representatives where there is a bankruptcy. We are satisfied that this case is within the Act, and therefore the question is which alternative of the rule ought to be absolute. We think that it ought not to be absolute to enter satisfaction on the roll, because although the judgment would be satis-



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fied as regards this defendant only, yet, in proceedings against other shareholders, the plaintiff would have to shew that the satisfaction was under the act of parliament, otherwise it would be presumed that the judgment was satisfied, in the ordinary way, by payment. We are therefore of opinion that the rule ought to be absolute to stay the proceedings, and the remaining question is upon what terms. It seems to us that we cannot impose any terms, because the statute has provided that the certificate shall be given on such terms as to the payment of the costs of any actions, suits, or other proceedings as the person granting the certificate shall think fit to direct. That may be a hardship on the plaintiff, who may not have been present when the certificate was granted, or have had an opportunity of being heard upon the matter; but looking at the discretion as to costs given to the persons who grant the certificate, we think it ought to be exercised by them, and if not, it ought not to be assumed by us. The rule will therefore be absolute to stay the proceedings.

Rule absolute accordingly.

Nov 24 WILKETT, Appellant, v. ROOPE and Another, Respondents.

By agreement in writing the appellant agreed to serve the respondents as a house-keeper, placed at daily wages for twelve months.

By another agreement of the same date K. agreed to serve the respondents for the same period as house-keeper fireman, to be paid by piece work, he paying the appellants wages out of what he earned. — *Held*, that the relation of master and servant subsisted between the respondents and the appellant notwithstanding his wages were paid by K. and consequently he was properly convicted under the 4 Geo. 4, c. 24, for absconding himself from the respondents service.

THE following case was stated for the opinion of this Court, pursuant to the 20 & 21 Vict. c. 43.—The respondents are manufacturers of earthenware at Burslem in Staf-



fordshire. The appellant is a journeyman ovenman. On the 20th March, 1860, the appellant was summoned before a justice of the county of Stafford upon a complaint, that "he, the appellant, having contracted and agreed with Thomas Boote and Richard Boote, under a written agreement, to serve them in their business of earthenware manufacturers as a biscuit-oven placer, at Burslem in the said county, from the 11th of November, 1859, to the 11th of November, 1860, did, on the 25th of February, and on subsequent days to the date of the complaint, unlawfully misdeemean, misbehave and misconduct himself in his said masters' service, (to wit) that he did unlawfully neglect and absent himself from his said masters' service without having given to his said masters any notice thereof, without the leave of his said masters, and did neglect to perform part of his said work and to obey the lawful commands of his said masters, and without any sufficient reasons for so doing, contrary to the statute," &c.

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On the hearing of the complaint the following facts were proved:—By an agreement dated the 15th of November, 1859, the appellant agreed to serve the respondents as a biscuit-oven placer, from the 11th of November, 1859, to the 11th of November, 1860, at four shillings a day. The agreement was as follows:—

"This agreement, made this 15th day of November, 1859, between Thomas Boote and Richard Boote, copartners, of Burslem in the county of Stafford, potters, hereinafter called 'the said potters' of the one part, and the several other persons whose names are mentioned in the first Schedule hereto affixed, who are hereinafter described as 'the said workmen' of the other part: Whereby the said workmen (each of them agreeing for himself only, separately from the others of them, so as to constitute a separate contract) do hereby in consideration of the wages or prices



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hereinafter mentioned or referred to, contract and agree to serve the said potters as potters, that is to say, in that branch of a potter's business mentioned opposite to their respective names in the first Schedule hereto, at Burslem, in the said county, faithfully, honestly, and diligently, from the 11th day of November, 1859, until the 11th day of November, 1860 (the usual holidays excepted); during all which period the said workmen agree to do and perform their work in a good, skilful and workmanlike manner, and to attend to the business of their said employers during the regular and usual working hours; to execute their lawful commands, preserve their secrets, advance their interests to the utmost of their power, and in all respects to behave as honest and faithful servants. And the said workmen agree to be satisfied with such work as the said potters can fairly and reasonably provide for them during the said term, and to be subject to the rules of their manufactory. And in consideration of the premises, the said potters hereby agree separately with the said workmen (and so as to constitute a separate contract with each workman) to receive the said workmen into their employment as aforesaid, and to find them respectively a reasonable proportion of work, and to pay them for the same, in respect of the articles or things mentioned in the second Schedule hereto subjoined, the wages or prices expressed in the same Schedule, and in respect of any articles or things not specified in the same Schedule, the same wages or prices as have been paid by the said potters for the same work during the year, commencing on the 11th day of November last. And it is hereby agreed that if the said workmen, or any of them, shall, at any time during the existence of this agreement, be required by the said potters to execute any work (within their respective branches of a potter's business) not specified in the said Schedule hereto, and which has not been



executed at the manufactory of the said potters during the year commencing the 11th day of November last, the said workman or workmen shall execute such work on being paid a reasonable price for the same; such price, in case of disagreement, to be settled by arbitration in manner herein-after expressed; and that, until the decision of the arbitrators shall be declared, the said workman or workmen shall continue to perform such work, and shall receive after the rate of four shillings per day on account of his or their wages in respect thereof. And further, that if any dispute arise between the said parties, or any of them, as to the prices or wages to be paid to the said workmen or any of them by virtue of this agreement, such dispute shall (on the request in writing of either of the parties in dispute, within fourteen days after the question shall have arisen) be referred to the decision of six arbitrators, three of whom shall be manufacturers and shall be chosen by the said potters, and the remaining three arbitrators shall be working potters and shall be chosen by the workman or workmen with whom the question shall have arisen; such arbitrators to appoint some impartial and competent person as umpire; and the decision of such arbitrators and umpire, or the majority of them, shall be final and conclusive on both parties. And if either party shall (for seven days after notice in writing from the other of them requiring him or them so to do) fail to appoint his or their arbitrators, the other party may proceed alone, and such referees or the majority of them shall have full power, on the application of either party, to fix the time and place for entering on such reference, and to proceed therein whether both parties shall attend or not. Provided always, that if at any time during the continuance of this agreement, the said potters shall not within the period of four successive weeks find and give to any of the said workmen such work as afore-

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said for at least sixteen days (unless prevented by the acts or neglect of any other workman at the said manufactory) the workmen or workman to whom such insufficient work shall be given shall be at liberty to terminate this agreement as between himself and themselves and the said potters, upon giving four weeks' notice to the said potters of his or their desire so to do. And lastly, it is hereby declared that if, during the continuance of this agreement, any number of workmen shall withdraw from the manufactory of the said potters in violation of existing agreements, so as to prevent the general business of the said manufactory from being carried on, then and such in case it shall be lawful for the said potters to put an end to the several contracts hereby made or entered into or any of them. As witness," &c.

"Signed

"T. Boote."

"This agreement is subject to the rules and customs of last and former years."

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"THE FIRST SCHEDULE ABOVE REFERRED TO.

"Signature of Workmen.

"William Willett."

(Then followed the signatures of nine other workmen.)

"All to receive as under-named opposite their respective names.

"BRANCH OR DEPARTMENT OF BUSINESS.

"4s. per day for each day's work done.

"Biscuit Oven Placers."

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"THE SECOND SCHEDULE ABOVE REFERRED TO."

(This Schedule was blank.)

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By another agreement, also bearing date the 15th of November, 1859, Thomas Robinson and John Bowers entered into the service and employment of the respondents as biscuit-oven firemen, and they were to be paid by the respondents 1*s.* per score for placing and firing twenty dozen of ware to be delivered into the biscuit warehouse, and a further sum of 20*s.* per oven for odd work, it being understood that out of the price of one shilling per score of twenty dozen, and the extra charge for odd work, Robinson and Bowers should pay to the appellant Willett, and the other nine workmen, parties to the first mentioned agreement, the wages payable to them by virtue of such agreement, Willett and others being employed in placing the ware in the ovens to be fired by Robinson and Bowers. The agreement with Robinson and Bowers was in the same printed form as the other agreement. Robinson and Bowers were the only workmen who were parties to it; and they were described, in the first schedule, as "biscuit firemen." The second schedule was thus filled up:—"This agreement is subject to the rule and custom of last year. To receive 1*s.* per score of twenty dozen of ware, delivered in the biscuit warehouse, and subject to count as heretofore: 20*s.* per oven odd work."

The entry of the work done, and the wages paid for the same work, is made in the book kept by the respondents for that purpose in the following manner:—

" Bowers & Co.

|                                       |   |                                |
|---------------------------------------|---|--------------------------------|
| "6050 dozen, at 1 <i>s.</i> per score | } | "19. 2 <i>s.</i> 6 <i>d.</i> " |
| dozen. Odd work for 4 ovens,          |   |                                |
| 20 <i>s.</i> per oven.                |   |                                |

It was proved that the above sum of 19*l.* 2*s.* 6*d.* included the wages payable to the appellant and the other workmen; and it was proved that the respondents were in the habit of paying several workmen under one name, and so enter-

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ing it in their wages book; but no specific sum was reckoned in that as payable to the appellant.

On the 25th February the appellant, with the nine other workmen, parties to the first mentioned agreement, refused to carry out the dishes from the dish-makers' place to the oven, which they had always heretofore done, alleging, as a reason, that since their hiring extra work had been put upon them, namely, sanding the saucers. About the middle of the day of the 25th February, the appellant absented himself from work without the permission of the respondents, and did not return to his work, although required by the respondents to do so; but he returned on the 27th of February, and continued to work as theretofore, except carrying out the dishes, which he refused to do. The appellant and other workmen had offered to leave the question in dispute to arbitration, which the respondents refused. Some time after November, Robinson gave the appellants a month's notice to leave; but, at the expiration of the month, Robinson agreed that the appellant should continue to work, which he did. On the examination of Robinson, on the part of the appellant, he admitted that there had not been any express contract of hiring of the appellant by Robinson and Bowers; but he stated that the appellant had performed part of the work comprised in the agreements.

It was objected, on behalf of the appellant, that the relation of master and servant did not subsist between the respondents and the appellant, notwithstanding the first mentioned agreement; and it was alleged, on his behalf, that he had worked under Robinson and Bowers, who had paid him the wages he was entitled to out of the money received under their agreement from the respondents.

It was further urged that the agreement was vague and indefinite, as the rules and regulations were not specified, and that any dispute about work could be referred to arbitration.



The appellant was convicted and sentenced to one month's imprisonment in the House of Correction.

The questions for the opinion of the Court are : Whether, under the circumstances stated, the relation of master and servant did subsist between the respondents and the appellant, and whether there was an absenting from the service within the meaning of the Act; whether the agreement was vague and indefinite, and therefore void; whether the dispute ought not to have been referred to arbitration, and whether the conviction was correct in point of law.

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*J. E. Davis* argued for the respondents, in last Trinity Term (May 28).—First, the relation of master and servant existed between the respondents and the appellant. The first agreement was a valid contract for service, and capable of being enforced under the 4 Geo. 4, c. 34, s. 3: *Regina v. Welch* (a). It will be contended that, inasmuch as the appellant worked under Robinson and Bowers, the relation of master and servant existed between him and them, and not between him and the respondents. But it is usual for a servant of this description to work under a foreman or other workmen. It is true that the appellant received his wages from Robinson and Bowers; but they were merely the hand which paid the wages due from the respondents. There was nothing in the second agreement to interfere with the relation of master and servant which existed between the respondents and the appellant. Robinson and Bowers engaged to work by the piece, and they were to receive what was earned, after deducting the wages of the appellant and other workmen. The effect of this arrangement was to give Robinson and Bowers an interest on the amount of work done. Suppose they had left or been dismissed, and the appellant and other workmen had sued the

(a) 2 E. & B. 357.



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respondents for their wages, would it be any answer to say, "We made an arrangement with Robinson and Bowers, by which you worked under them, and they were to pay you your wages out of the money which they earned"? There was clearly an absenting from service, and a refusal to work. —Secondly, the first agreement is not vague and indefinite. (*Scotland*, for the appellant, abandoned that objection.)—Thirdly, this case is not within the provision for referring disputes to arbitration. That clause merely relates to disputes as to the prices or wages to be paid to the workmen; and in that case the agreement expressly provides that the workmen shall continue to perform the work and receive their wages at the rate of four shillings a day, until the decision of the arbitrator. Here the appellant refused to do the work which he contracted to perform. If the respondents had wrongfully discharged the appellant from their service, would it be any answer to an action against them that the agreement contained a stipulation for referring to arbitration disputes about wages?

*Scotland*, for the appellant.—The conviction is bad. The 3rd section of the 4 Geo. 4, c. 34, provides for two distinct offences: first, where a person shall in writing contract to serve, and shall not enter into his service; secondly, where, having entered into the service, he shall absent himself, whether the contract be in writing or not. The relation of master and servant does not exist between the respondents and appellant, consequently there is no absenting from service, within the meaning of that Act. The written contract under which the appellant entered the service was superseded by the implied contract which arose from the second agreement, by which the appellant and the other workmen worked under Robinson and Bowers, who paid them their wages. [*Bramwell*, B.—Sup-



pose Robinson and Bowers failed to pay the appellant his wages, could he not maintain an action against the respondents?] The contract being transferred, no action would lie; for the appellant was no longer the servant of the respondents, but of Robinson and Bowers. The case finds that Robinson gave the appellant a month's notice to leave, but afterwards agreed that he should continue to work. [*Channell*, B.—The case does not state affirmatively that the appellant left with the consent of Robinson and Bowers, nor does it on the other hand negative that consent.] All parties acted as if the contract was between the appellant and Robinson and Bowers. Who would bear the loss if the appellant did not work? Not the respondents, but Robinson and Bowers. It is immaterial who, in fact, hires the servant; the employer is the master for whose service he is retained: *Rex v. Hoseason* (a). Further, the arbitration clauses apply, and the respondents having refused to refer the dispute to arbitration, the appellant committed no offence by leaving. A mere absenting is not sufficient to constitute an offence within the Act, but there must be an absenting without lawful excuse, and with a guilty intention: *Rider v. Wood* (b), *Ashmore v. Horton* (c). The leaving under a mistaken notion of a right to leave is no offence. Here the appellant believed that he had a reasonable excuse for leaving the respondents' service.

The judgment of the Court was now delivered by

BRAMWELL, B.—We are of opinion this conviction should be affirmed.

The first question is, did the relation of master and servant exist between the respondents and appellant? The facts are that the respondents are master potters, that they

(a) 14 East, 606.

(b) 29 L. J., M. C. 1.

(c) 29 L. J., M. C. 13.



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hired the appellant and several other men for a considerable period, by a written agreement, at the wages of four shillings a day. On the same day that this agreement of hiring was made, the respondents engaged with two other men in writing for their services, and undertook that they would pay them one shilling for every dozen score put into the oven. In truth this meant that a sum, arrived at by taking one shilling for every dozen score of the total quantity put into the oven, was to be given to these latter men, but that out of the sum so given to them they were to pay the other men their daily wages. The appellant and the other men who signed the first mentioned agreement were no parties to this, but in fact they *were* paid their wages by the hands of the two men named in the second agreement. It was said this established the relation of master and servant between the men in the second and those in the first agreement, and destroyed it between the respondents and the appellant. But this is not so. It is to suppose that the appellant and the respondents entered into an agreement for no purpose but at once to cast it aside. The matter is very intelligible. The appellant desires to have, and the respondents desire to pay, fixed daily wages for the appellant's labour. But the respondents desire to have that benefit which is got from careful supervision and the partial application of the principle of piece work. They therefore hire the appellant at daily wages, and they agree with the two men in the second agreement that the appellant shall work under them as under a foreman, and that they the foremen shall be paid thus:—An account shall be taken, at one shilling for every dozen score, of all articles put in the oven; that so much of that sum as exceeds the wages of the men employed, shall be paid to them, the foremen, to keep for their own benefit; and that for the convenience of all parties the residue of that sum shall be given to them, for them to be the hands who pay the men.



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July 6.

THE HULL FLAX AND COTTON MILL COMPANY v.  
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By the deed of settlement of a Joint Stock Company, it was provided that the capital of the Company should be 100,000*l.* in 1000 shares of 100*l.* each, and that it should be competent for any general meeting of the Company to create additional shares of 100*l.* each. The Company, at a general meeting, created 1500 new half shares of 50*l.* each, some of which the defendant purchased, executed the deed of settlement and received the dividends declared on the shares. It was afterwards resolved, at a special general meeting,

that the Company be wound up under the Joint Stock Companies Acts, 1856, 1857, and the defendant was sued for calls made by the directors and the Liquidators of the Company.—*Held*, that the defendant was estopped from denying that the 50*l.* shares were valid shares.

A Joint Stock Company, formed in 1857, and which had obtained an Act enabling the Company to sue and be sued in the name of one of the members as a nominal plaintiff, was afterwards registered and incorporated, pursuant to the Joint Stock Companies Acts, 1856, 1857.—*Held*, that the incorporated Company could sue for calls made by the directors before the incorporation of the Company.

After an order for the voluntary winding-up of a Joint Stock Company, the Liquidators appointed under the Joint Stock Companies Acts, 1856, 1857, may make calls without giving the notices prescribed by the provisions of the deed of settlement or Acts, for calls made by the directors.

**DECLARATION.**—The Hull Flax and Cotton Mill Company, being a company duly registered according to the Joint Stock Companies Acts, 1856, 1857, by &c., their attorney, sue for money payable by the defendant, for calls made by the direction of the said Company, according to the provisions of the deed of settlement of the said Company, upon shares in the Company, being part of the capital stock of the said Company, whereof the defendant was the proprietor and holder; the defendant on becoming a shareholder in the said Company, having executed the said deed of settlement of the said Company, and having thereby, before the said Company was registered, covenanted with certain trustees on behalf of the said Company, to pay such calls when made upon him, and all conditions precedent to the validity of the said calls and to the liability of the defendant as a shareholder in the said Company, to pay the amount of the said calls, having been duly performed.—And for calls made by the liquidators of the said Company upon the defendant as a shareholder and contributory of the said Company, the said Company having been duly registered under the Joint Stock Companies Acts, 1856, 1857, and having in general meetings passed and confirmed a special



resolution requiring the Company to be wound up voluntarily according to the said Acts, and having appointed liquidators; and all conditions precedent as to the validity of the said calls and to the liability of the defendant, as a shareholder and contributory, to pay the amount of the said calls, having been performed according to the provisions of the said Acts of Parliament, &c.

Pleas, to the first count.—First: Never indebted.—Secondly, that the defendant was not a holder or proprietor of the shares.—Thirdly, that the calls were not made by the directors, in accordance with the provisions of the deed of settlement.—Fourthly, that the calls were made before the Company was registered according to the Joint Stock Companies Acts, 1856, 1857, and whilst the Company was an unincorporated Company.

To the second count.—Fifthly, that the defendant was not a shareholder or contributory of the Company.—Sixthly, that the Company was not duly registered under the Joint Stock Companies Acts, 1856, 1857.—Seventhly, that special resolutions, requiring the Company to be wound up voluntarily, were not passed, and confirmed in accordance with the provisions of the Acts.—Eighthly, that liquidators were not duly appointed.—Ninthly, that the calls were not made by the liquidators upon the defendant, according to the provisions of the Acts.

The defendant also demurred to the first count. The plaintiffs took issue on all the pleas except the fourth, and demurred to that plea. The defendant joined in demurrer.

The cause came on to be tried before *Pollock*, C. B., when a verdict was taken for the plaintiffs, subject to a special case, in substance as follows:—

The plaintiffs were a Company, originally constituted under a deed of settlement dated the 5th of April, 1837.

By this indenture, which recited that the parties thereto

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had agreed to form a Company for the purpose of purchasing, importing, &c., flax and cotton, and had agreed to raise amongst themselves a capital of 100,000*l.*, to establish and carry on the business, each of the parties covenanted with P. and H. in manner expressed in clauses numbered from 1 to 107.

"4. That the capital of the Company shall be 100,000*l.*, divided into 1000 shares of 100*l.* sterling, &c., and each of the shares shall be distinguished by a number, beginning with number 1."

"14. That every proprietor of shares in the Company shall pay so much of the amount by him respectively subscribed for as hath not already been paid by him, by such instalments and at such times as the Board of directors shall call for the same, &c. And notice in writing of such call shall be given to every proprietor at least thirty days previously to the day on which the same is to be paid," &c.

"20. That no proprietor, &c., shall be allowed to transfer any share or shares without the approbation of the Board of directors," &c.

21. Directors to regulate the form of transfer.

"22. That every transfer shall carry with it the profits and interest &c., in respect of the shares transferred," &c.

"30. That every person approved as a proprietor or transferee of shares shall "execute these presents or some deed of accession," &c.

"31. That a purchaser of shares shall not, as to all profits, privileges, &c., be considered the proprietor until he shall have executed or otherwise acceded to these presents."

"85. That it shall be competent for any general meeting of the Company, &c., to increase the capital of the Company, and to raise such increased capital by creating an additional number of shares, of 100*l.* each, and to cause such additional shares to be sold at such prices as the Board



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proprietors, stating in their notices the object of the meeting, and lay a statement of the affairs of the Company before such meeting. And it shall be lawful for any one or more of the proprietors at such meeting to require the dissolution of the Company, and the same shall be accordingly dissolved forthwith, and the affairs thereof wound up in manner hereinafter mentioned, unless three-fourths of the proprietors, &c., shall be desirous of carrying on the Company, which they shall be at liberty to do upon purchasing the shares of the party or parties desirous of withdrawing from the Company, &c.: provided that nothing herein contained shall extend to release such retiring proprietors from bearing their proportion of the losses of the Company up to the day of such special general meeting.

"99. That in case such loss should not be incurred, an absolute and entire dissolution of the Company and determination of the partnership may take place on the terms, and on no other terms (that is to say), by and with the consent and approbation of three fourth parts, at least, in number and value, of the votes of the proprietors present, and voting at two successive special general meetings."

"107. The proprietors to keep and perform the covenants, articles, &c., of the deed: and the damages and costs recovered under the covenant shall be paid over to the directors for the time being, to be applied by them as part of the assets of the Company."

In 1841, the Company obtained an Act, 4 & 5 Vict. c. xcvi., "An Act for regulating proceedings against the Hull Flax and Cotton Mill Company" (a). At the annual general

(a) The material parts of this Act are as follows:—Whereas "difficulties have arisen and may hereafter arise in legal proceedings by or against the Company, since by law all the members for the time being must be named in such proceedings: And whereas

it is expedient that the Company should be rendered capable of suing and being sued in the name of one individual as a nominal party to such legal proceedings:" Be it enacted, that "in all actions, suits and other legal proceedings other than proceedings of a cri-



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proprietor desirous of transferring his shares with the name of the intended transferee, and the price, and signed by the transferor. The notice was brought before a board of directors, and, if approved, signed by the chairman. The proposed new proprietor, if he had not already executed the deed of settlement, was then usually required to do so, as proprietor of the shares intended to be transferred to him. The new proprietor was then entered in the register of shareholders. After the deed had once been executed, no acceptance in writing was required of any fresh shares transferred to a proprietor.

On the 22nd of February, P. Haydon gave notice to the board of his wish to transfer one share of 100*l.*, and three half shares of 50*l.* each, to the defendant. The transfer was assented to by the chairman, and shortly afterwards the defendant executed the deed of settlement of the Company as the proprietor of the above four shares. He was then entered as the proprietor of these four shares in the register of the Company.

The following is a copy of the heading of the schedule to the deed which is executed by new proprietors of the Company, and the entry made therein when the defendant executed the said deed :—

| Christian and Surname. | Place of Abode and Profession. | Number of Shares Subscribed for. | Certificate Nos. | Capital Subscribed. | Seals.  | Witnesses.          |
|------------------------|--------------------------------|----------------------------------|------------------|---------------------|---------|---------------------|
| W. H. C. Wellesley,    | Hull.                          | Four.                            |                  | 250                 | (L. s.) | William Hartcliffe. |

The defendant afterwards purchased three whole shares of J. A., and was entered in the share register of the Company in respect thereof.

In November, 1850, the directors caused a memorial of the name, residence, and description of the defendant, as a person admitted to be a shareholder, to be enrolled in Chancery.



Subsequently to the defendant being registered as a shareholder, dividends were declared: viz., in September, 1850; March, 1851; August, 1851; August, 1852; February, 1852; February, 1853; February, 1854, and March, 1855. These dividends were either paid to the defendant's agent, or applied in part payment of calls.

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In June, 1851, the directors made a call of 5*l.* per share on the half shares, payable on the 21st of July, 1851. The sum of 15*l.*, payable on the defendant's three half shares, was deducted from the dividends on his shares, and in that way paid to the Company.

On the 27th of May, 1856, the directors made a call of 5*l.* a share upon each of the half shares, payable on the 2nd of July then next, and notice thereof was sent by post to the defendant, but it never in fact reached him. The defendant never paid this call of 15*l.*

On the 6th of July, 1857, another call of 5*l.* a share on the half shares was made, which is still unpaid.

On the passing of the 7 & 8 Vict. c. 110, the Company was registered under the 58th section. In August, 1857, the Company was registered under the Joint Stock Companies Acts, 1856, 1857.

At the end of the month of August, it was ascertained that more than one-fourth, and in fact the whole, of the capital of the Company, had been lost; that there was no guarantee fund, and that the Company was largely indebted. And at a meeting of the directors held on the 15th of September, 1857, the following resolutions were unanimously passed and entered in the minute book of the board of directors:—

“That a special general meeting of the Company be held on Thursday, the 1st of October, for the purpose of considering the propriety of dissolving the Company, and the voluntary winding up of its affairs, under the provisions of the Joint Stock Companies Acts, 1856 and 1857; and



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if a resolution to that effect be passed, to appoint a liquidator," &c.

In pursuance of notices forwarded to the proprietors, the meeting was held, and the necessary number of proprietors being present, resolutions were passed:—

"That the Company be dissolved, subject to the provisions of the Joint Stock Companies Acts, 1856 and 1857, and be wound up voluntarily under the provisions of the same Acts."

"That W. E. and J. C. be appointed liquidators under the said Acts to wind up the Company."

These resolutions were advertised in the *London Gazette* of the 6th of October, 1857, and were confirmed at a special general meeting held on the 3rd of November, 1857. The liquidators made calls of 25*l*. on each of the whole shares, and two calls of 12*l*. 10*s*. and 5*l*. respectively on each of the half shares.

The sums called for by the liquidators were deemed by them to be necessary, and were in fact necessary, to satisfy the debts of the Company.

The question for the opinion of the Court is,—Are the plaintiffs entitled to recover from the defendant 30*l*., being the amount of two calls made by the directors of the Company upon the defendant, and 152*l*. 10*s*., being the amount of calls made by the liquidators? The Court to be at liberty to draw any inferences of fact (*a*).

*Mellish* argued for the plaintiffs, in last Easter Term

(*a*) The defendant's points for argument on the demurrer and special case were as follows:—That the Company had no power to create half shares. As to the first count:—That no debt was ever due to the Company; that no action is maintainable by the Company for calls. That the action should have been brought

in the name of the trustees mentioned in the Company's deed of settlement, upon the covenant contained in that deed. As to the second count:—That the Company was not subject to be wound up under the winding-up statutes. That no sufficient notice of the calls in the second count mentioned was given.



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shareholders. Whatever may have been the terms upon which new partners were originally to be taken in, it was competent to the parties, at any time, to enter into fresh arrangements on that head. The Company, having admitted the defendant to execute the deed in respect of the half shares, and the defendant having done so, both parties are estopped. The Company cannot now deny that the defendant is a shareholder in respect of these shares; nor can the defendant set up that he is not the proprietor of those shares, and liable to pay calls upon them. The case is analogous to *The Sheffield, Ashton-under-Lyne and Manchester Railway Company v. Woodcock (a)*, where it was held that a defendant, by his conduct, was estopped from denying the validity of a transfer. The 85th clause contains a proviso that no act shall be done which shall release any proprietor for the time being from liability to pay and satisfy the entire sum of 100*l.* in respect of every share, nor which shall affect or infringe upon the rateable or proportionable division of the profits, and liability to the losses of the Company between the proprietors. If the proprietors of half shares were to have the same rights as the proprietors of whole shares, this proviso might apply. But the meaning of the resolution creating the half shares is, that a person must hold two half shares in order to be entitled to the privileges of the holder of a share.

Secondly, as to the suggestion that the Company have no right to sue for calls made by the directors before the incorporation of the Company under the Joint Stock Companies Acts, 1856, 1857.—In *Wills v. Sutherland (b)* it was held that an Act empowering a Company to sue and be sued in the name of a public officer in all actions to be thereafter “instituted by or on behalf of the Company,” authorized the secretary to sue on a covenant with trustees for the Company. At the time of the incorporation of this Company, the right of

(a) 7 M. & W. 574.

(b) 4 Exch. 211.



action was vested in the manager on behalf of the Company, and the question is, what was the effect of the incorporation? It is submitted that the 19 & 20 Vict. c. 47, and the 20 & 21 Vict. c. 14, rendered it obligatory on this Company to register. [*Wilde, B.*—However that may be, they were in fact registered, and the question is, what was the effect of registration?] By the 111th section of the 19 & 20 Vict. c. 47, previously to the registration of any existing Company, there shall be delivered to the registrar, in case of such a Company as the present, a list of shareholders, and also a copy of the act of parliament, deed of settlement, or other instrument constituting or regulating the Company. By section 112 the list of shareholders, and other particulars, are to be verified; and, by section 33 of the 20 & 21 Vict. c. 14 (which repeals the 113th section of the former Act), on compliance with these requisitions the registrar is to certify that the Company is incorporated under the Joint Stock Companies Acts, 1856, 1857; and thereupon such Company shall be incorporated; “and all the provisions of the Joint Stock Companies Acts, 1856, 1857, shall apply to such Company, in the same manner in all respects as if it had been originally incorporated under such Acts, subject to the reservation in favour of creditors contained in the principal Act,” &c. By section 115 of the 19 & 20 Vict. c. 47, the date of the certificate is to be deemed the date at which the Company is incorporated. By section 116 the registration is not to prejudice any right which, previously to such registration, had accrued against any person then being a member of the Company. The effect of the incorporation is to vest in the incorporated Company everything which belonged to the old Company, and, amongst other things, their choses in action. By the 22nd section of the 19 & 20 Vict. c. 47, the amount of calls for the time being unpaid on any share shall be deemed a debt due from the holder of such share to the Company. [*Martin, B.*—Whilst

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the Company were unincorporated, it was necessary that a public officer should sue ; but the essence of incorporation is that they can sue for themselves.]

Thirdly, as to the point that the liquidators had no right to make calls. The 98th clause of the deed provides for the winding up of the Company when one-fourth of the capital is lost. The 102nd section of the 19 & 20 Vict. c. 47, enacts, that "a Company may be wound up voluntarily," whenever the "event, if any, occurs upon the occurrence of which it is provided by the articles of association that the Company is to be dissolved." And, thereupon, "its corporate state and all its corporate powers shall, notwithstanding any provision to the contrary in its articles of association, continue until the affairs of the Company are wound up." By section 104 ; the property of the Company is to be applied in satisfaction of its liabilities ; and the liquidators may call on all or any of the contributories to the extent of their liability to pay all or any sums they may deem necessary to satisfy the debts of the Company, &c.

Fourthly, as to the objection that the notice of the calls made by the liquidators was insufficient. There is nothing in the 19 & 20 Vict. c. 47, which requires any particular notice to be given of a call made by liquidators. The provisions relating to calls by the directors in collecting the capital have no reference to calls made by the liquidators for the purpose of paying the debts of the Company. The provisions for winding-up the Company are a substitute for proceedings by creditors, and it is reasonable that shareholders, who are protected from executions by individuals, should be made liable to pay the calls at once and without notice, as in case of a debt due to a creditor. When calls are made by the Court of Chancery, under the 82nd section, there is simply an order that the parties in a certain list shall pay the calls at a certain time. The words giving power to the liquidators to make calls in case





of a voluntary winding-up contemplates the making of calls in the same way. Table B. is merely a sketch of what it is supposed the articles of association may be, and (2) does not affect the question.—He also referred to the 19th section of the 19 & 20 Vict. c. 47, and the 13th section of the 20 & 21 Vict. c. 14.

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*Lush* (with whom was *Raymond*) argued for the defendant (May 3).—The main question with regard to the first count is, whether half shares could be legally created. It is submitted that the creation of such shares is not warranted by the deed of settlement, and that nothing has taken place which has the effect of giving validity to them. By the 4th and the 85th clauses of that deed it appears that the parties thereto agreed to admit as partners, persons who might hold that amount of capital. The forms of voting at general meetings are wholly inapplicable to persons who are the holders of half shares. A person having less than a share, does not covenant for the payment of calls. The covenant (clause 14) is by the proprietors of *shares*. The provisions with respect to the transfer, in consequence of death or otherwise, all relate to *shares*. It was never contemplated that any one holding a less interest than a share should be a partner in the concern; for there is no such share or interest as a half share in the partnership capital. This is a matter relating to the constitution of the Company which could not be altered without the assent of every individual shareholder. Even with the assent of all the shareholders, the provisions of the deed of settlement in this respect could not be varied, except by a new deed. Notwithstanding all that took place, it is still competent for any individual shareholder to say, "there are no half shares." The defendant, therefore, has no legal title to a distribution of profits, on the footing that these half shares were well created.



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There is no estoppel, for the defendant bought these shares in the market after they were created. No doubt it is enough, for the purpose of calling a meeting, if notice is sent to the registered address of each shareholder; but the case does not shew what number attended, and it is consistent with every statement in it that one-third of the shareholders never consented to the creation of these half shares, and that the resolution was carried by a bare majority. [*Bramwell*, B. — Have not the directors the option of regarding these shares as valid?] They cannot validate them as against third parties without their consent. The shares were invalid at their original creation in 1845; the defendant purchased in 1850, so that he cannot be affected by what previously took place. [*Wilde*, B. — How can a person who has purchased the shares say that they are invalid?] The defendant is not the holder of the shares, for in law they do not exist. The Company would have had no power to increase the capital by creating additional 100*l.* shares except for provision in the 85th clause. [*Pollock*, C. B. — Ought not the defendant to have repudiated the shares when he found that the Company had no power to create them?] He was not bound to do so, for the shares are mere nullities.—As to the third point, the liquidators have no power to wind up the Company in the manner they have done. The 98th and 99th clauses provide for the winding-up of the Company; and by the 33rd section of the 20 & 21 Vict. c. 14, those provisions are to be deemed the regulations of the Company, in the same manner as if they were contained in a registered memorandum of association and articles of association. Therefore the winding-up must be under the deed and not under the Act, and the clauses in the deed do not authorize this proceeding.—On this point he also referred to the 19 & 20 Vict. c. 47, ss. 9, 19, 22, and clause 14 of the deed of settlement. He abandoned the second point.



*Mellish*, in reply.—The defendant having executed the deed and kept the shares, is estopped from saying that he is not a shareholder. [*Martin*, B.—Suppose the trustees had sued him on his covenant to pay the calls, what could he have pleaded?] Only non est factum. [*Martin*, B.—Both parties having acted upon the faith of these shares being valid, they are equally precluded from disputing that fact. *Bramwell*, B.—Suppose a partnership deed provided that no contract made by the partners should be valid unless in writing, and one of the partners made a parol contract which was acted upon, would it not be binding?] All parties would be estopped from disputing its validity. The defendant is a shareholder within the definition of the 19th section of the 19 & 20 Vict. c. 47.—He also referred to the 61st section of that Act.

*Cur. adv. vult.*

MARTIN, B., now said.—This was an action brought by the official liquidators in the name of the Company for the purpose of compelling the payment of certain calls; and the objection was, that, as by the constitution of the Company, which was originally a Joint Stock Company, formed under a deed, the only power to create new shares was to create shares of 100*l.*, although at the general meeting of the Company, duly convened, new shares of 50*l.* were created, such shares were void: that although the defendant had executed a deed whereby he bound himself to take these shares and pay the calls made upon them, yet, the shares not being created in conformity with the power in the deed, the defendant was not bound to pay the calls made by the Company, and was also under no obligation to pay the calls made by the official liquidators for the purpose of winding-up the affairs of this Company.

The question was ably argued on both sides, but we are



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of opinion that the argument on behalf of the plaintiffs must prevail. Whether we consider the case with reference to the calls made by the official liquidators in pursuance of the Act for winding-up such bodies as this, or to the calls made by the Company under the powers in their deed, the defendant, who executed a deed, whereby he expressly bound himself to pay calls on these shares, is estopped from setting up this answer, and is bound by his own contract to admit that the shares are good and valid, more especially as for a number of years he had derived a benefit from them. Our judgment is therefore for the plaintiffs.

The demurrer involved the same question as the special case. It was said there was a difference between one class of calls and another, and possibly it may be so; but, nevertheless, as our judgment is for the plaintiffs upon the entire case, it is useless to go into that question.

Judgment for the plaintiffs.



June 22.

EMBLEM v. MYERS.

In an action for wilful negligence, the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff's rights and convenience, the jury may give exemplary damages.

THE declaration stated that the plaintiff, before and at the time of the committing of the grievances, &c., was possessed of certain land, and a certain stable and loft, in the city of London, and then occupied the same, and used it for the purposes of his trade, to wit, of a coal and coke dealer; and the defendant, to wit, on &c., and on divers other days &c., before the commencement of this suit, wrongfully and injuriously pulled down a certain other building in the city aforesaid, next adjoining the said land, stable, and loft of the plaintiff, in so negligent and improper a manner, and with such a want of proper and due care and skill in that



behalf, that by reason thereof a piece of timber fell upon the said stable and loft of the plaintiff, and upon a truck and cart of the plaintiff, then standing upon the said land, and used by the plaintiff in his said trade, whereby the said stable and loft were greatly injured, and the gates of the said stable and loft were broken and destroyed, and the roof thereof stripped therefrom, and divers goods and harness of the plaintiff therein, exposed, damaged, and destroyed, and the said truck and cart of the plaintiff were broken and spoiled, and rendered unfit for use in his said trade, and by reason of the aforesaid negligence, carelessness, and unskilfulness of the defendant, a part of the said building so pulled down also fell upon a certain horse of the plaintiff, then upon the said land, and used by the plaintiff in his said trade, whereby the said horse was severely injured, and has been, and now is, rendered unfit for work; and by reason of the premises the plaintiff hath from thence hitherto lost and been deprived of the use of his said stable and loft, and of his said cart and truck, and of his said horse, goods, and harness, and has been unable to carry on his said trade, and has lost divers profits therein. &c.

Plea.—Not guilty.—(By statute 18 & 19 Vict. c. 122, ss. 38, 69, 71, 72, 74, 108.)

At the trial, before *Wilde*, B., at the London sittings in last Trinity Term, it appeared that the plaintiff was the owner of a small piece of land, in Gravel Lane, Houndsditch, on which he built a stable and loft, for the purpose of his trade as a coal and coke dealer. The defendant was the owner of an adjoining house, which, being in a dilapidated state, he was required by the police to pull down. The defendant had applied to the plaintiff to purchase his premises, but the plaintiff refused to sell them. The labourers employed by the defendant pulled down his house in such a reckless manner that a large piece of timber

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fell on the plaintiff's stable, and knocked in the roof, which fell upon the horse and cart of the plaintiff. At that time the plaintiff's wife was in the stable. The plaintiff remonstrated with the defendant, but he said that the plaintiff had served him with a lawyer's letter and a writ, and that he would go on. The defendant told the labourers they might "work anyhow," and they threw down upon the stable great quantities of bricks, by which more injury was caused to the stable than by the pulling down of the house; and it was suggested that this was done with a view to cause the plaintiff to give up the stable.

The learned Judge told the jury that they should take into consideration all the circumstances, both the conduct of the defendant and the expressions he used, and that if they were of opinion that the destruction of the stable was caused by the negligence of the defendant in pulling down the houses, they should give such damages as they thought a reasonable compensation for the injury the plaintiff had sustained; but if they were of opinion that what was done by the defendant was done wilfully, with a high hand, for the purpose of trampling on the plaintiff and driving him out of possession of the stable, they might find exemplary damages. The jury having found a verdict for the plaintiff, with 75*l.* damages,

*Collier*, in the same term, obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury in telling them that in awarding damages they should consider the motives of the defendant, and give a different measure of damages if the injuries were committed maliciously, from that which would be applicable if they were committed negligently; and that the damages were excessive: against which

*Robinson and Sharpe* now shewed cause.—There was no misdirection. First, it is said that the learned Judge ought



not to have told the jury to take into consideration the motive of the defendant, since the declaration does not charge him with a trespass, but with negligence only. But if the objection had been taken at the time of the summing up, the Judge would have amended the declaration. The objection, not having been then taken, is not now available: *Doe d. Strickland v. Strickland* (a). Assuming, however, that the objection is open, the evidence justified the jury in giving exemplary damages. In Sedgwick on Damages, p. 460, 2nd ed., reference is made to an action on the case for gross negligence, in which *Church, J.*, in delivering the opinion of the Supreme Court of the United States (b), said: "There is no principle better established, and in practice more universal, than that *vindictive damages or smart money* may be and is awarded by the verdict of juries, and whether the form of action be trespass or case."—They also argued that the damages were not excessive.

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*Collier* and *H. James*, in support of the rule.—As this declaration is framed, it was a misdirection to tell the jury to give one measure of damage if the injury was caused by negligence, and another if it was wilful. No doubt, in actions of trespass, evidence of malicious motives is admissible: *Mayne on Damages*, p. 13, *Sears v. Lyons* (c). So also in actions for defamation: *Pearson v. Lemaitre* (d). But there is no instance of it in an action like this. [*Pollock*, C. B.—It is very improbable that the question of motive should arise in an action for negligence; but, if it does, the Judge is warranted in telling the jury that if the defendant did not intend any wrong, they should limit their verdict to the damage really sustained; but if the injury was committed

(a) 8 C. B. 724.

(c) 2 Stark. N. P. 317.

(b) *Tracy v. Swartwout*, 10 Peters, 81.

(d) 5 Man. &amp; G. 700.



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in an insolent way, they might take into consideration the motive and give exemplary damages.] The plaintiff merely complains of negligent conduct on the part of the defendant in pulling down his house, whereby the plaintiff's stable was injured. In actions for negligent driving, the motive is never taken into consideration. [*Wilde, B.*—Suppose a servant, while driving, was in the act of pulling up to prevent running against some person, and his master said, "Never mind; drive on," might not the jury take that into consideration?] Not in an action for negligent driving, but only in an action of trespass for wilful driving.—They also argued that the damages were excessive.

POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. I consider that the direction of the learned Judge was substantially this:—"In measuring these damages, you may take into consideration expressions used by the defendant shewing a contempt of the plaintiff's rights and convenience." It is universally felt, by all persons who have had occasion to consider the question of compensation, that there is a difference between an injury which is the mere result of such negligence as amounts to little more than accident, and an injury, wilful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages, such as are sometimes given in actions of trespass but the measure of damage should be different, according to the nature of the injury and the circumstances with which it is accompanied. It appears to me that this declaration may be read as charging a wilful wrong. It is true that the complaint is that the defendant acted negligently and with a want of due care; but it is also stated that he *wrongfully* and *injuriously* pulled down the house, and consequently the injury was one which would admit of damages



to an amount beyond that which the learned Judge, by his direction, invited the jury to give. The Courts have always recognised the distinction between damages given with a liberal and a sparing hand; and, since the language of this declaration is such that it may be read as charging a wilful wrong, and as it appears that the wrong was accompanied with expressions of contempt, I think that the direction of the learned Judge was correct, that the damages are not excessive, and, consequently, the rule must be discharged.

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BRAMWELL, B.—I am also of opinion that the direction of the learned Judge was perfectly correct. As soon as it is admitted that the plaintiff may recover more than the actual loss, and that collateral facts may be inquired into, that principle applies, whether the injury was caused by the negligent or wilful act of the defendant. Suppose a person caused a nuisance in front of another man's house, damages might be given for the insult as well as the actual injury. It is said that the act of the defendant was wilful, and therefore the plaintiff cannot recover on this declaration; but the act was negligent as well as wilful. In my opinion the plaintiff is entitled to recover the whole amount which he has chosen to claim. If a plaintiff, in his particulars, claimed 500*l.* because the defendant walked over his lawn, the jury might award that amount if they thought it was done for the purpose of annoyance and insult.

CHANNELL, B.—At first I thought that the declaration might be treated as charging an act of trespass as well as negligence; but, on looking more closely into it, I think it must be read as charging the defendant with wilful negligence. Then it remains to be seen whether the summing up of the learned Judge was correct. In substance it was this: "You may take into consideration all



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the circumstances, and see whether there is anything to satisfy you that the defendant behaved in an improper and unjustifiable manner; and if so, you need not give damages strictly, as in the case of mere negligence, but you may give them with a liberal hand." If in actions of trespass the plaintiff may recover damages beyond the amount of the actual injury, I see no reason why the same rule should not extend to wilful negligence. As to the statement that the damages are given for something wilful, not negligent, the objection should have been taken at the trial that the evidence was not receivable upon such a declaration. For these reasons I think the rule ought to be discharged.

WILDE, B.—I am of the same opinion. I am glad the Court have come to the conclusion that upon this declaration it was competent for the jury to give exemplary damages, because it appeared to me at *Nisi Prius* that the case was a harsh one, and that the defendant acted with a high hand, intending to turn the plaintiff out of possession. It is said that, under this declaration, evidence as to wilfully destroying the plaintiff's shed ought not to have been admitted; but the defendant's counsel permitted it to be given without the slightest objection. Then, assuming that was one of the matters to be inquired into, there is no foundation for the objection that the damages are excessive. It is impossible to say that when a wrong is committed in the mode in which it was here committed, the circumstances attending its commission are not to be taken into consideration by the jury, with the view of properly estimating the damage. I did not tell them to find distinct damages in consequence of the defendant's conduct, but to take into consideration all the circumstances, both the conduct of the defendant and the expressions he used.

Rule discharged.



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YATES v. THE MAYOR, ALDERMEN AND BURGESSES OF  
THE BOROUGH OF BLACKBURN.

July 6.

**DECLARATION.**—That, before and at the time of the making of the sewer hereinafter mentioned, the plaintiff was seised &c. of a plot of land at Bank Top, in the borough of Blackburn, through which the defendants, under the powers granted to them by the Blackburn Improvement Act, 1854, made a main sewer, and by the making of which the said land was injuriously affected; and thereby the plaintiff, under and by virtue of the Blackburn Improvement Act, 1854, and the Lands Clauses Consolidation Act, 1845, became entitled to claim compensation from the defendants in respect of the injury to his land; and, being so entitled, on the 16th of December, 1858, gave a notice in writing to the defendants, stating in such notice the nature of his interest in his land in respect of which he claimed compensation, and the nature of the injury to the land, and that he claimed the sum of 300*l.* as compensation for the injury, and that unless the defendants, within twenty-one days after the receipt of that notice, paid the said amount, or entered into a written agreement to pay the same, the plaintiff desired to have the amount of such compensation settled by arbitration in the manner prescribed by the Lands Clauses Consolidation Act, 1845: that the

The plaintiff, whose lands were injuriously affected by certain works of the defendants, who were acting under a statute with which the Lands Clauses Consolidation Act, 1845, was incorporated, on the 16th of December, 1858, gave notice under the 68th section of that Act that he claimed compensation in respect of such injury, and that unless the defendant paid the amount claimed within twenty-one days, he desired to have the amount of compensation settled by arbitration under that Act. Twenty-one days after this notice, the plaintiff, by writing under his hand, nominated a person as his arbitrator, and on the 17th of January, 1859, gave notice to the defendants that he had done so, and required the defendants to appoint an arbitrator on their part. On the 25th of January the defendants tendered to the plaintiff 30*l.* for the alleged damage and costs, which the plaintiff refused. The defendants then nominated an arbitrator on their part, and the sum of 23*l.* was ultimately awarded to the plaintiff as the amount of compensation to which he was entitled.—*Held*, that the plaintiff was not entitled to the costs of the arbitration by the 34th section of the 8 & 9 Vict. c. 18, the tender being in time, inasmuch as the plaintiff had not pursued the proper steps pointed out in the 25th section, and had not delivered his appointment to the arbitrator when the tender was made.



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defendants did not, within twenty-one days after they were served with the said notice, or before they were served with the notice next mentioned, pay the compensation so claimed, or enter into any written agreement for that purpose, or make any offer to pay the plaintiff any sum whatever in respect of his claim to compensation; and thereupon the plaintiff, after the expiration of twenty-one days, to wit on the 7th of January, 1859, by writing under his hand, nominated and appointed T. Slatter to be the plaintiff's arbitrator in respect of the said claim to compensation, and afterwards, on the 17th of January, 1859, served the defendants with another notice in writing that he had nominated and appointed T. Slatter to be his arbitrator in respect of his claim to compensation, and that he required the defendants to appoint an arbitrator, to whom, together with the said T. Slatter, the question as to such compensation should be referred: that afterwards, on the 7th of February, 1859, the defendants, by writing &c. under their common seal, appointed P. Park to be the arbitrator of the defendants in respect of the said claim to compensation: that afterwards, and before the said arbitrators entered upon the matters referred to them, they, by writing under their hands, appointed A. Bannerman to be the umpire to decide in any matters in which they should differ or which should be referred to him under the said Acts: that all things were done and happened, and all times elapsed, which were necessary, according to the provisions of the said Acts, to entitle the umpire to make a valid award &c.; and thereupon the umpire, on the 25th of April, 1859, delivered to the defendants his award &c., and thereby awarded that 23*l.* should be paid by the defendants to the plaintiff in respect of his claim to compensation: that, the defendants not having made any offer to pay the plaintiff any sum whatever in respect of his said claim according to the



terms of the said Acts, the plaintiff afterwards required the umpire to determine the costs to be paid to him by the defendants under and by virtue of the Lands Clauses Consolidation Act, 1845: that the umpire afterwards, by writing &c., duly settled the costs of the plaintiff of the said arbitration, and thereby ascertained and settled the same to be 351*l.*; of all which the defendants afterwards had notice, and were requested by the plaintiff to pay him the said two sums of 23*l.* and 351*l.*: Yet the defendants have not paid the same &c.

**Pleas.**—As to so much of the declaration as relates to the sum of 351*l.*, being the said costs &c.: That before the defendants appointed P. Park to be the arbitrator of the defendants, to wit on the 25th of January, 1859, the defendants were ready and willing to pay to the plaintiff, and then duly offered to the plaintiff to pay him, 30*l.* in respect of his claim to compensation, and the plaintiff then admitted the offer but refused to receive the same: that the defendants were at all necessary times in that behalf ready and willing to pay the plaintiff 30*l.*, as he always well knew; and thereupon afterwards, to wit on the 3rd of February, 1859, the defendants, by writing under their common seal, appointed P. Park to be their arbitrator. (The plea then set out the appointment by the defendants of P. Park as their arbitrator, the appointment of the umpire and his award, which concluded as follows):—  
“I do award, settle, order and determine that the sum of 23*l.* shall be paid by the mayor, &c. to W. Yates as the amount of compensation to be paid by the mayor, &c. to W. Yates for and in respect of the damage sustained, or hereafter to be sustained, by W. Yates by reason of the mayor, aldermen, &c., and their surveyor, workmen and contractors, entering upon his land and pulling down, removing and carrying away buildings &c., and by reason of

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the execution of such sewage works &c., regard being had to the damage already sustained and to the damage to be sustained by W. Yates in consequence of such user, and also by reason of any other act, matter or thing referred to me : the said sum of 23*l*. being, in my judgment, the fair and just sum which ought to be paid by the said mayor, &c. to W. Yates for such compensation as aforesaid. As witness my hand and seal this 25th of April, 1859. A. Bannerman (L. s.).” That the said sum of 30*l*. so offered by the defendants to the plaintiff was more than sufficient to satisfy the amount of compensation so found to be due and payable by the defendants to the plaintiff by the said A. Bannerman, and all costs incurred by the plaintiff at the time of the said offer. And, as to so much of the declaration as relates to the said sum of 23*l*. awarded by A. Bannerman to be paid by the defendants to the plaintiff as the amount of compensation to be paid by the defendants to the plaintiff in respect of his said claim to compensation, &c. ; that at the commencement of this suit the plaintiff was and still is indebted to the defendants in an amount exceeding his said claim, for half the costs of the said A. Bannerman, paid by the defendants for the plaintiff at his request, which half of the said costs was and is the proportion of the said costs payable by the plaintiff, by reason of the sum awarded to the plaintiff by the said A. Bannerman being less than the sum so offered by the defendants to the plaintiffs as aforesaid, and out of and against which money so due to the defendants they are willing to set off and allow to the said plaintiff his said claim.

Replication.—That the said offer to the plaintiff to pay him 30*l*. was made after the plaintiff had appointed an arbitrator and given notice thereof to the defendants, as in the declaration mentioned, and had by reason thereof incurred costs of and incident to the said arbitration, which are



included in the said sum of 351*l.*; and that the offer to pay the plaintiff the said sum of 30*l.* was contained in a letter written by the town clerk of the said borough of Blackburn, addressed to J. H. Kay, the attorney of the plaintiff, as follows:—

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“Town Clerk’s Office, Blackburn.

“Dear Sir,

“25th January, 1859.

“The Mayor, &c., of Blackburn, and William Yates.

“I am directed to tender to your client the sum of 30*l.* on behalf of the mayor, aldermen and burgesses of this borough, for *alleged damage* to his property *and costs*, occasioned by the sewerage works near Pink Street. Must I make this tender personally to Mr. Yates or will you, as his attorney, admit it on his behalf? If this sum be not accepted I will send you the name of the arbitrator on behalf of the mayor, aldermen and burgesses.

“Thos. Ainsworth,

“John Hargreaves Kay, Esq.”

“Town Clerk.”

That the plaintiff refused to accept the offer contained in the said letter and waived any tender of the said sum of 30*l.*; and that the offer contained in the said letter was the only offer made by the defendants to pay him the said sum of 30*l.*

Rejoinder.—That in answer to the letter of the Town Clerk, the attorney of the plaintiff, with his authority, wrote as follows:—

“Blackburn,

“Yates and the Mayor, &c., of Blackburn.

“Dear Sir—My client is strongly impressed with the conviction that by proceeding he will obtain much more than the sum you offer, besides all his costs, &c. Without prejudice, therefore, I beg to say that he will accept of 45*l.*, in full of damages and costs. If this is not accepted



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by the end of the week the arbitration had better proceed, and in which case I will admit your tender of the 30*l*.

"Thomas Ainsworth, Esq.

"Yours truly

"Town Clerk, Blackburn."

"J. H. Kay."

Which letter was written and sent to the defendants with the plaintiff's authority, and was received by them before the appointment by the said P. Park, and which letter is the refusal by the plaintiff to accept the 30*l*. and the waiver by the plaintiff of any other tender.

Demurrer, and joinder therein.

*Mellish* argued in support of the demurrer (a).—By the 34th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), "All the costs of any arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The question is, within what time must the offer be made. It is submitted that it must be made before any costs have been incurred about the matter of the arbitration. If that construction is not to prevail, why should not the offer be made at any time before the award is actually made? Claims for compensation for lands injuriously affected by the execution of works are provided for by the 68th section of 8 & 9 Vict. c. 18, which enacts that if the party desire to have his compensation settled by arbitration, he may give notice in writing of his desire, and unless the promoters be willing to pay the amount claimed, and shall enter into a written

(a) In Easter Term, April 30 Before Pollock, C. B., *Mason, J. Brownell, B., and Wilde, J.*



agreement for that purpose within twenty-one days, the same shall be settled by arbitration; therefore until the expiration of the twenty-one days the case is not one for arbitration. If the promoters desire to avoid having to pay the costs under the 34th section, they must make the offer within these twenty-one days. It is too late after the claimant has nominated his own arbitrator under the provisions of the 25th section. [*Pollock*, C. B.—It is clear that the offer could not be made effectually after the arbitration had commenced.] The costs of applying to and nominating a person to be arbitrator are costs of the arbitration, or incident to it.—Secondly, the offer should have been of a sum for compensation only, not of an entire sum for compensation including the costs.

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*Lush* (with whom was *Keane*), for the defendants.—The tender was in time. The appointment of an arbitrator by the plaintiff did not preclude the Company from making a tender, although the plaintiff incurred costs which would be taxed as part of the costs of the arbitrator. The case is analogous to that of a tender of a debt, without costs, after an application by the creditor's attorney, but before a writ has issued. Unless some time after the expiration of the twenty-one days is allowed to the Company to make a tender, the party claiming compensation may deprive them of all opportunity of tendering. Immediately the twenty-one days have elapsed the claimant may appoint an arbitrator. The Company cannot have the compensation settled by arbitration unless the claimant wishes it; and yet, in the very notice in which he elects that tribunal, he may appoint an arbitrator. Where the compensation is to be settled by a jury, the statute prescribes the day when the tender may be made. By section 38, the Company must give the claimant ten days' notice of their intention to summon a



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jury, and the notice must state what sum of money the Company are willing to give him for the damage sustained. But in the case of arbitration there is no such provision. [*Wilde, B.*—It is clear from the 25th section that some time must elapse after the claimant has expressed his desire to have the compensation settled by arbitration.] The Company are entitled to tender compensation at any time before the submission to arbitration is complete. Then it is said that the plaintiff has incurred costs in appointing an arbitrator. In like manner costs are incurred where a party instructs his attorney to demand payment of a debt, but he cannot recover them if the debt is paid before a writ issues. Again, if each party appoints an arbitrator, and the arbitrators appoint an umpire, and no award is made for three months, by section 23 the compensation must be settled by a jury, in which case the Company must give the ten days' notice, stating how much they are willing to give, as required by the 38th section. In that case the claimant could not recover the costs of the arbitration. So, here, the tender is not bad because some costs have been incurred.—He referred to *Regina v. Byrom (a)*.

*Mellish*, in reply.—It is clear that a tender cannot be made at any time before the award; therefore there must be some limit, and it is submitted that the tender must be made before the claimant has appointed an arbitrator. Until that time there is a mere claim on the one side and a refusal on the other; but the appointment of an arbitrator is analogous to the issuing a writ.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

(a) 12 Q. B. 321.



MARTIN, B.—This is a question arising upon a demurrer, and the facts appearing upon the record are these:—On the 16th of December, 1858, the plaintiff gave a notice in writing to the defendants stating that he claimed compensation to the extent of 300*l.*, by reason of certain lands of his being injuriously affected by a sewer made by the defendants; and that unless the defendants, within twenty-one days, paid that amount or entered into a written agreement to pay the same, the plaintiff demanded to have the amount of compensation settled by arbitration, in the manner prescribed by the Lands Clauses Consolidation Act, 1845. On the 7th of January 1859, being twenty-one days after the giving of the above notice, the plaintiff, by writing under his hand, nominated a person to be his arbitrator in respect of his claim; and on the 17th of January served a notice in writing upon the defendants stating that he had done so, and required the defendants to appoint an arbitrator on their part. On the 25th of January the defendants caused a letter to be written to the plaintiff stating that they were ready to pay 30*l.* to the plaintiff for his alleged damage and costs, and if this sum was not accepted they would send the name of their arbitrator. Upon the 26th of January the plaintiff caused a letter to be written to the agent of the defendants stating that he refused to accept the 30*l.*, but that he would accept 45*l.* in full of damages and costs; and that if that offer was not accepted the arbitrator had better proceed, in which case the plaintiff would admit a tender of 30*l.* On the 3rd of February the defendants appointed an arbitrator. The two arbitrators appointed a Mr. Bannerman to be the umpire. It devolved upon him to make the award, and he did so on the 25th of April, and awarded 23*l.* to be paid by the defendants to the plaintiff, as full compensation for every thing as to which he had power to award compensation. The umpire was afterwards requested to settle the costs of

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the plaintiff and the arbitration, and he did so, by writing under his hand, at 351*l*. The sum of 30*l*. was more than sufficient to pay the sum of 23*l*. awarded to be paid by the umpire and all costs incurred by the plaintiff anterior to the 25th of January, when the sum of 30*l*. was to be taken as tendered; and the question which has been argued before us is, whether, by virtue of the Lands Clauses Consolidation Act, 1845, the plaintiff is entitled to recover in the action the costs, amounting to 351*l*.

The question depends upon the construction of the 68th, 25th and 34th sections of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). The argument on the part of the plaintiff is, that if the party against whom compensation is claimed do not, within twenty-one days after notice, be willing to pay the amount claimed and enter into an agreement to pay it, it is competent for the claimant upon the twenty-second day to appoint an arbitrator; and whatever the event of the arbitration or umpirage may be, if the party to pay the compensation do not, before the appointment of the claimant's arbitrator, make the tender, he must of necessity pay to the claimant the costs of the arbitration. The 68th section enacts, that unless the promoters (the character filled by the defendants) are willing to pay the amount of compensation claimed, and enter into a written agreement for that purpose within twenty-one days after the receipt of the notice making the claim, the amount of compensation shall be settled by arbitration. The notice was given upon the 16th of December, and the twenty-one days expired upon the 7th of January. The defendants had not before then agreed to pay the amount claimed. The compensation therefore was to be settled by arbitration. The 25th section provides for it, and that section seems to us to enact, first, that an endeavour should be made by the parties to concur in choosing a single arbitrator, and in the event of



this failing, that a request should be made by the one upon the other that the latter should nominate an arbitrator; that then each should make appointments in writing and deliver them to their respective arbitrators, which are to be deemed the submission, and irrevocable. In the present case the plaintiff made no attempt to procure the appointment of a single arbitrator. On the contrary, on the expiration of the twenty-one days he at once appointed an arbitrator in the sense of signing a paper nominating one, but it does appear that he delivered it to the arbitrator. He afterwards gave notice to the defendants of his having made the appointment, and called upon them to appoint one, and after this the tender was made. The contention on the part of the plaintiff was that the tender was too late, because he had then incurred costs incident to the arbitration; but without laying down a rule as to the time within which the tender must be made, to relieve the party making it from costs by virtue of the 34th section, we think that in the present case the tender was in time, inasmuch as the plaintiff did not pursue the proper steps pointed out in the 25th section, and had not, when the tender was made, delivered his appointment to the arbitrator—up to which time everything previously done was revocable by him.

We cannot forbear expressing our concern and regret that it appears in this case that, whilst the compensation awarded was 23*l.* only, the costs of the arbitrators and umpire, and of one party to the arbitration, amount to the enormous sum of 351*l.*

Judgment for the defendants.

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June 21. MASON v. THE BIRKENHEAD IMPROVEMENT COMMISSIONERS.

The 3 & 4 Wm. 4, c. lxviii., for paving, lighting, &c., the town of Birkenhead, by sect. 201 enacts that no plaintiff shall recover in any action, &c., to be commenced against the Commissioners for anything done or to be done in pursuance or under the authority of the Act, unless notice in writing shall have been given to the defendants. The Commissioners were sued for an injury occasioned by the negligence of some pavours, their servants. —Held, that they were entitled to notice of action, and that a notice detailing the facts, but not stating an intention to bring an action, was insufficient.

**DECLARATION.**—That the defendants wrongfully, negligently, and unlawfully put and placed, and caused to be put and placed, large quantities of stones, &c., upon a certain public highway, and kept and continued the same thereon during the day and night without any light or other signal, by means whereof the plaintiff passing along the highway fell over the same, &c.

**Pleas.**—First: Not guilty. Secondly, that the supposed grievances were committed after the passing of an Act (3 & 4 Wm. 4, c. lxviii. (a)) for paving, lighting, &c., the town of Birkenhead; and that the matters complained of were done by the defendants as Commissioners under the said Act, and in pursuance and under the authority of the Act; and that no notice in writing, signed by the attorney for the plaintiff and specifying the cause of action, was given to the defendants, or either of them, thirty days before the commencement of the suit, pursuant to the said statute.

Upon these pleas issues were joined.

At the trial, before the Recorder of London, at the Chester Spring Assizes, the plaintiff proved that on the

(a) Section 201 enacts, "That no plaintiff shall recover in any action or suit to be commenced against the Commissioners or any of them or any other person, for anything done or to be done in pursuance or under the authority of this Act, unless notice in writing, signed by the attorney for the plaintiff, and specifying the

cause of such action, shall have been given to the defendants thirty days before such action shall be commenced; nor shall the plaintiff recover in any such action if tender of sufficient amends shall have been made to him or his attorney, by or on behalf of the defendant, before such action brought," &c.



17th of January, 1859, he fell over some flagstones lying on a footway in the town of Birkenhead which had been put there by some paviers employed by the defendants in repairing the gutter and kerb of the footway. On the 30th of May, 1859, the plaintiff's attorney wrote to the defendants as follows:

"18, Price Street, Birkenhead.

"Gentlemen,

"I am instructed by Mr. John Mason to apply to you for compensation for the serious injuries he has sustained through the carelessness and negligence of yourselves and your servants in leaving large quantities of materials on the public highway without any protection, and to inform you that unless some reasonable compensation is made an action will be brought against you.

"To the Commissioners of

"Yours, &c.

"Birkenhead."

"S. O. Husband."

On the 31st of July the plaintiff wrote to the defendants a full and detailed statement of the accident and its supposed cause, but the letter did not state his intention to bring an action. The jury found a verdict for the plaintiff, leave being reserved to the defendants to move to enter a verdict for him if the Court should be of opinion that there was no sufficient notice of action.

*Welsby*, in Easter Term, having obtained a rule nisi accordingly,

*Beavan* (with whom was *H. Lloyd*) shewed cause (a). —The 201st section of the 3 & 4 Wm. 4, c. lxviii., provides that no person shall recover in any action unless "notice in writing, &c., specifying the cause of such action shall have been given," &c. Under these words it is enough to give

(a) In Trinity Term, May 31. Before *Bramwell*, B., and *Chanell*, B.

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notice of the facts out of which the cause of action arises. The letter of the plaintiff of the 31st of July is therefore a sufficient notice. [*Welsby*.—The notice must be “signed by the attorney for the plaintiff” (a).] A person may act as his own attorney. The 24 Geo. 2, c. 44, s. 1, requires the notice of action against a justice of the peace to be served by the attorney or agent for the party who intends to sue; but in *Morgan v. Leach* (b) it was held that service by the clerk of the attorney was sufficient. *Norris v. Smith* (c), which may be relied on as shewing that distinct notice must be given of the intention to bring an action depends on the peculiar words of the statute which was under consideration in that case.—The plea is bad. The 5 & 6 Vict. c. 97, s. 4, which provides for the uniformity of notices of action, enacts that “in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced.” Therefore the plea should have averred that the plaintiff did not “one calendar month” before action give the notice. [*Bramwell*, B.—Is it necessary to give notice in an action for negligence?]

*Welsby*, in support of the rule.—*Norris v. Smith* (c) is a distinct authority that the notice must state positively that an action will be brought, and that a conditional notice is insufficient. The letter of the plaintiff’s attorney neither states that an action will be brought, nor does it specify the cause of action with time and place, as it should have done: *Martins v. Upcher* (d). The Commissioners in causing the streets to be channelled and paved were acting in pursuance of the Act, and therefore, though the injury

(a) See *Bennett v. Broughton*,  
 cited 10 M. & W. 559.  
 (b) 10 M. & W. 558.

(c) 10 A. & E. 188.  
 (d) 3 Q. B. 662.



was occasioned by the negligence of their servants, they were entitled to notice of action.

*Cur. adv. vult.*

BRAMWELL, B., now said:—There is one objection which is fatal to the maintenance of this action,—the notice of action being clearly insufficient. We had some doubt however whether notice of action was necessary, the action being for negligence. It may be that notice of action is not necessary, where the negligence is the personal negligence of the individual; but when the negligence is the negligence of a servant of the Commissioners acting in the execution of the Act, we think they are entitled to notice.

CHANNELL, B., concurred.

Rule absolute (a).

(a) See 2 Chitty's Statutes, by Welsby and Beavan, p. 710.

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June 19, 20.

**DECLARATION.**—That after the passing of the Corrupt Practices Prevention Act, 1854, to wit, on the 20th day of August, 1859, there was holden an election in and for the borough of Berwick-upon-Tweed, for the return of a member to serve in parliament for the said borough, and one D. C. Marjoribanks was a candidate at the said elec-

The register of voters at a parliamentary election, made in pursuance of the 48th and 49th sections of the 6 & 7 Vict. c. 18, is a document of such a public

nature as to be admissible in evidence upon its mere production by the returning officer, and therefore an examined or certified copy of it is also admissible.

In an action for penalties, under the Corrupt Practices at Elections Act, 1854 (17 & 18 Vict. c. 102), the plaintiff gave in evidence a copy of the writ and return from the office of the clerk of the Crown, certified by a clerk in the office to be a true copy of the original writ and examined therewith. The defendant's counsel having allowed it to be given in evidence as a certified copy:—*Held*, that, assuming it was not, there was no ground for granting a new trial.

*Semble* that, in such an action, parol evidence of an election having taken place is not sufficient without proof of the writ, return and register.



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tion within the meaning of the Act; that after the passing of the Act and before this suit, the said election being so holden and the said D. C. Marjoribanks being such candidate, the defendant was guilty of bribery at the said election, &c., by giving money to one M. Middlemas, then being a voter for the said borough for and at the said election &c., in order to induce the said M. Middlemas to vote for the said D. C. Marjoribanks at the said election, contrary to the said statute, whereby the defendant then forfeited and became liable to pay for his said offence 100*l.*, for which sum the plaintiff in this Court sues according to the said statute; and the plaintiff saith that all things have happened and all periods of time have elapsed necessary to enable the plaintiff to sue for and recover the said sum of 100*l.*, &c.

There were ten other similar counts for giving or offering bribes to other voters, or giving drink by way of refreshment to voters on account of their being about to poll at the election.

Plea: Not guilty (by statute 21 Jac. 1, c. 4, s. 4).

At the trial, before *Hill*, J., at the last Spring Assizes for the county of Northumberland, in order to prove the holding of the election, Mr. Bacon, managing clerk of the plaintiff's attorney, said:—"I have a certified examined copy of the writ and return for the election on the 20th of August, 1859, from the office of the clerk of the Crown in Chancery." It was put in and taken as read.

Copies of the poll books were then produced, stamped with the seal of the Crown-office in Chancery. Bacon said, "I looked at the copies while a Mr. Leman, who appeared to be acting as a clerk in the office of the clerk of the Crown in Chancery, read over the originals. The copies were delivered out by the clerk. I bespoke them and saw the stamps affixed in the office." On cross-examination, Mr. Bacon said he looked at the originals, and in some instances



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Crown. Examined therewith this 20th day of February,  
1860. G. V. Leman. Henry Walker."

'The writ was as follows:—

"Victoria, &c. To the sheriff of the borough of Berwick-upon-Tweed: Whereas, &c., we have ordered a certain parliament to be holden, &c. We command, &c., you, that within the borough aforesaid one fit and discreet burgess, within six days after the receipt of these presents (first giving three clear days' notice at the least of the day of such election, exclusive of the day of proclamation and of the day of election), freely, &c., you cause to be elected, and the names of such burgess, &c., you cause to be inserted in certain indentures to be thereupon made between you and them who shall be present at the election, &c.: And this election so made distinctly, openly under your seal, &c., you certify to us in our Chaucery by forthwith remitting to us one part of the aforesaid indentures annexed to these presents, together with this writ. Witness ourself, &c. Romilly. Abbott."

"To the sheriff of the borough of Berwick-upon-Tweed, or his deputy. A writ for a new election of a burgess for the said borough.  
"Romilly. Abbott."

"Received on the                      day of                      at                      A. M.  
"Jos. Heming, Sheriff."

"The execution of this writ appears in the schedule hereunto annexed.

"The Answer of Jos. Heming, Sheriff."

The copy indenture was stamped and certified in the same manner as the writ. It stated that proclamation had been made and notice of the day of election given by the sheriff, and that by virtue of the writ thereunto annexed, the electors present on the day of the date thereof had elected D. C. Marjoribanks.

At the conclusion of the plaintiff's case, and after his



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of the insufficiency of the stamp, which must always be taken before the document is read. Secondly, the copies put in were properly certified copies. They purport to be office copies, and at the end of each is the certificate "this is a true copy of the original." It must be taken that the person who signed the copy had the custody of the originals, and therefore the document was admissible under the 14 & 15 Vict. c. 99, s. 14. [*Wilde, B.*, referred to *Baker v. Cave (a)*.]

Thirdly, as to the poll-books, copies were produced from the office of the clerk of the Crown in Chancery, which were sufficiently proved to have been examined copies. But, as office copies, they were admissible in evidence. By the 6 & 7 Vict. c. 18, s. 94, office copies of the poll-books, issued by the clerk of the Crown or his deputy, are made evidence. It was proved that Leman, who gave out these copies, was a clerk in the office, "he was acting as such." When a person is appointed to a public office he must necessarily employ clerks. There was therefore evidence for the jury that Leman was the proper officer to issue the copies of the poll-books which were in his custody. [*Wilde, B.*—Rightly or wrongly, the poll-books were in the custody of the clerk in the office. May it not be said that a document is entrusted to the clerk, if he has the possession of it?] Assuming that the copies were not made admissible by the 6 & 7 Vict. c. 18, s. 94, the provisions of that clause are cumulative and do not exclude other proof. Office copies of documents of public importance are admissible in evidence, if the officer be bound either at common law or by statute to furnish copies: *Taylor on Evidence*, p. 1235, 3rd ed.; citing *Buller's Nisi Prius*, p. 229. In *Appleton v. Lord Braybrooke (b)*, *Bayley, J.*, distinguishes that case, where it was held that a colonial judgment could not be proved by an office copy, from one "where there is a known

(a) 1 H. &amp; N. 674.

(b) 6 M. &amp; Sel. 34.



officer whose duty it is to deliver out copies," as in the instance of the chirograph of a fine. Poll-books are documents of a public character, office copies of which are made evidence, and these copies delivered out by a clerk in the office of the clerk of the Crown in Chancery, and sealed with the seal of the office, are therefore, at common law admissible in evidence as office copies. In *Mead v. Robinson* (a) a copy of the poll taken at a borough election was held to be admissible. So, in *Rex v. Hughes* (b), the copy of a poll on the election of a mayor.

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Fourthly, as to the register of voters produced by the town clerk. The document produced was a copy printed in accordance with the directions of the 6 & 7 Vict. c. 18, s. 49. The town clerk proved that it was a duplicate of the register in the possession of the returning officer. There was therefore evidence that this was an examined copy of the register. The register of voters in the custody of the returning officer is a public document of such a nature that it may be proved by the production of a copy.

Fifthly, as to the list signed by the revising barrister. This was the list handed to the town clerk in pursuance of the 6 & 7 Vict. c. 18, s. 48. In *Regina v. Clarke* (c), a similar list was admitted in evidence by *Byles, J.*, for the purpose of proving that a particular person was a voter. [*Channell, B.*—It appears to me that the plaintiff does not want this list, because there is sufficient evidence without it.]

Sixthly, the time of the receipt of the writ is sufficiently proved by the return. The return under seal (which was an act done by a public officer in the execution of his duty, and must therefore be presumed to have been done rightly,) states the proclamation and the notice of holding the election. If that document is evidence, there was abundant

(a) Willes, 422.

(b) Cited Willes, 424.

(c) 1 F. &amp; F. 654.



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proof that the election was rightly held. The return is the document which constituted the title of the member to his seat. [*Channell, B.*, referred to *The Irish Society v. The Bishop of Derry (a)*.]

Lastly, assuming that evidence material for the purpose of inducing the jury to come to a conclusion upon specific facts has been erroneously admitted, no new trial will be granted if it can be shewn that these facts need not have been proved. [*Bramwell, B.*—Suppose, in an action against the acceptor of a bill, the plaintiff attempted to prove the presentation, but did so by improper evidence, would that be wholly immaterial?] It is submitted that it would have been sufficient to prove an election de facto, without proving the regularity of it. The 17 & 18 Vict. c. 102, after reciting that “the laws now in force for preventing corrupt practices in the election of members to serve in parliament have been found insufficient, and that it is expedient to consolidate and amend such laws and to make further provision for securing the freedom of such elections,” by section 2 enacts that the following persons shall be deemed guilty of bribery and shall be punishable accordingly:—1. “Every person who shall &c. give, lend &c. any money or valuable consideration to or for any voter &c., in order to induce any voter to vote or refrain from voting &c. at any election.” Under these words the offence may be complete though no election ever took place. “Any election” means “any election which may thereafter take place.” The offence was complete by the corrupt act of purchasing or endeavouring to purchase the vote; therefore, even if the whole of the documentary evidence used at the trial were rejected, the offence would have been proved. [*Wilde, B.*, referred to *Doe d. Welsh v. Langfield (b)*.] *Middlemas* proved that there was an election de facto. [*Channell, B.*—The election is held by a person filling the office of re-

(a) 12 Cl. &amp; F. 641.

(b) 16 M. &amp; W. 497.



turning officer: the question is whether his authority must not be shewn.] No doubt it was necessary to prove that Middlemas was a voter, but the fact that the defendant offered a bribe to Middlemas as a voter is evidence, as against the defendant, that he was a voter. There was no contest on that point, and no cross-examination with reference to it at the trial. The Court in its discretion will not grant a new trial on a point on which there was abundant evidence uncontradicted on the former trial.

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*Edward James and Kemplay*, in support of the rule.—First, the parol evidence without the documents was not sufficient to support the verdict. That which constitutes the offence in respect of which the plaintiff has brought his action for a penalty, is bribery at a particular election. The declaration states that, on the 20th of August, 1859, there was holden an election for the borough of Berwick upon Tweed, and that the defendant bribed Middlemas to “vote at the said election.” In any case the plaintiff must prove that Middlemas was a voter. [*Wilde*, B.—In the interpretation clause (sect. 38) of the 17 & 18 Vict. c. 102 it is said, “the word ‘voter’ shall mean any person who has or claims a right to vote in the election of a member or members to serve in parliament.”] That does not refer to a person who is not a voter, and never pretended to be so. The words “claims a right to vote” apply to a case where a voter, who has been excluded by the revising barrister, has a right to claim to be a voter and tender his vote. In committee on a scrutiny, voters whose names have been expunged by the revising barrister might be retained: 6 Vict. c. 18, s. 98. Independently of the documentary evidence, there was merely *prima facie* evidence that Middlemas was a voter. The admission of the documentary evidence may have disabled the defendant’s counsel



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from commenting successfully on the *prima facie* evidence. [*Wilde, B.*—Would not the learned Judge have been bound to tell the jury that, if a bribe was offered to a person claiming to be a voter, the offence was complete?] It is submitted not, unless the claim was a real one. If the register had not been before the jury, it might have been contended with effect that the person bribed did not in reality *claim* to have a vote. [*Channell, B.*—The documentary evidence may be material to prove the averment in the declaration that the election was for a member for the borough of Berwick upon Tweed.] All that the jury would have been justified in inferring from the *parol* evidence was that something which was called an election was going on. There was nothing to shew that it was a proper assembly held in obedience to the writ. If there was no writ the supposed election was null and void, and no right of action for the penalty could have accrued.

Secondly, the documentary evidence was not admissible. With respect to the writ and return, the 14 & 15 Vict. c. 99, s. 14, only provides for the admissibility of an examined or certified copy of any book or document of a public nature. There is no statute which renders a copy of a writ admissible. If there was no writ there could be no election. The document produced and said to be a certified copy turned out not to be so. It was allowed to be taken as read, under the mistaken notion that it was a certified copy.

Thirdly, the copy of the register of voters was inadmissible. By the 45th section of the 6 & 7 Vict. c. 18 the revising barrister must deliver to the town clerk the list of voters, and the town clerk must cause the list to be copied and printed in a book, which he must sign and deliver to the returning officer. By the 45th section the printed book so signed is made the register of voters. This register is not a document of such a public nature as to be admissible in evidence on its mere production by the returning



officer; but it would be necessary to prove the signature of the town clerk, for without his signature it would not be the register. [*Channell*, B.—The right to have a copy is not limited to the inhabitants of the particular borough, but any of the public may obtain one on payment. *Pollock*, C. B.—The transfer books of the Bank of England relate only to the holders of stock, and yet they are public documents. A number of other books and documents of a like nature are mentioned in *Taylor on Evidence*, sect. 1438, p. 1281, 3rd ed., such as parish registers, the books of the East India Company, the rolls of courts baron, assessments of land tax, &c. (a).] The 6 & 7 Vict. c. 18 does not require the register to be kept in any particular place, only in the custody of the returning officer. Corporation books are admissible if they come from the proper custody: *Rex v. Mothersell* (b), *Phillipps on Evidence*, vol. 2, p. 229, 10th ed.; but there is no authority that a copy of them may be given in evidence. So with terriers or surveys of glebe lands, which are required by the ecclesiastical canons to be returned into the registry of the bishop: *Phillipps on Evidence*, vol. 2, p. 235, 10th ed. Printed copies of the statements of the annual accounts of a turnpike trust, produced from the office of the clerk of the peace (to which the originals, signed by the chairman at the annual general meeting, had been returned pursuant to the 3 Geo. 4, c. 126, s. 78), are not admissible in evidence, in an action against the trustees, without proof that the originals were lost or destroyed: *Pardoe v. Price* (c). Besides, the copy produced was not proved to be an examined or certified copy.

Fourthly, there was no evidence of notice of the election. [*Pollock*, C. B.—The House of Commons cannot assemble

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(a) See also *Motteram v. The Eastern Counties Railway Company*, 7 C. B. N. S. 558.

(b) 1 Str. 93.

(c) 13 M. & W. 267.



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without a previous proclamation; but, in a proceeding in which it became necessary to prove that the House was sitting, would it be necessary to prove that they were called together by proclamation? The maxim "omnia rite acta presumuntur" applies.] Unless notice be given according to the provisions of the 33 Geo. 3, c. 64, and 3 & 4 Vict. c. 81, the election would be wholly void. [*Pollock, C. B.*—As an election, but not for other purposes. Though a trial is set aside and a venire de novo granted, that does not prevent an indictment for perjury committed at the trial.]—They abandoned the objection as to the admissibility of the poll book.

*POLLOCK, C. B.*—We are all of opinion that the rule ought to be discharged. I am not aware that it is necessary to say anything with respect to the question whether parol evidence would be sufficient without the documents; but I cannot abstain from making this remark, that it appears to me idle to contend that there was no proof that the person bribed was a voter, or that there was an election for a member of parliament. Human life is too short to admit of its being occupied in needless repetitions. In an action by the assignees of a bankrupt, a witness is called and merely asked "are the plaintiffs the assignees?" The answer is, "yes." Then, is there to be a motion for a new trial because the witness was not asked whether the plaintiffs were the assignees of the particular bankrupt, naming him at the time? We ought not for a moment to entertain such an objection. The pleadings were opened and the jury were told what issues they had to try; and no doubt the learned counsel said that this was a proceeding by the plaintiff against the defendant, on the ground that on the 20th of August, 1859, there was an election, in and for the borough of Berwick upon Tweed, for the return of a member to serve in parliament for that borough. No doubt, also, it was



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answers the provisions under which such a copy may be given in evidence. I think that all the objections fail, and the rule must be discharged.

CHANNELL, B.—I also think that the rule ought to be discharged. It seems to me unnecessary to give any opinion upon the question whether parol evidence, apart from the documents, would have supported the plaintiff's case, because if the parol evidence can be connected with the documents there was clearly a case for the jury. Whether it can or cannot depends upon whether or no the documents were admissible. The objection to the poll-book was very properly given up, because it was admitted that an office copy of that poll-book would be evidence, and though there was no proof that the copy produced was an examined copy, it appeared that it was an office copy, and that is sufficient. There were three other documents, to the admissibility of which objection was made. First, it was said that there was no evidence of the writ having issued, and that the election took place under the writ. That is an important objection, because I am not prepared to say, that if there was no evidence that a writ issued, a mere election de facto would have supported this proceeding. I do not say it would not, but I guard myself against expressing an opinion that parol evidence of an election, unconnected with any writ, would have been sufficient. Then was there evidence, properly receivable, of a writ? A document was put in and a witness was asked if that was "an examined certified copy." The question involved two considerations, its being examined and certified. It was stated to be a certified copy, and the defendant's counsel was under that impression, and therefore allowed it to be taken as read. *Primâ facie* the defendant was bound by the admission that the document should be taken as



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and deliver them to the public on payment of a certain charge. It appears to me that the printed book is a public document, the production of which would be evidence *per se*, if produced from the proper custody, and consequently an examined or certified copy of it might be given in evidence. I do not however enter into the question whether the copy produced was examined or certified, because the only objection taken, according the Judge's note, was that the register itself must be produced. I come to this conclusion without any reluctance, because I cannot entertain a particle of doubt that the copy produced was a true copy. There was one other objection, viz., that due notice of the election was not proved, but that is immaterial; for when the writ was in evidence, and the register proved, it is no answer to say that the plaintiff has not proved a notice.

WILDE, B.—I am of the same opinion. The main point for our judgment is as to the admissibility in evidence of these three documents, the writ, the return, and the register. As regards the writ and return, they were produced by the plaintiff's counsel as certified copies, and it is plain that he thought they were. The counsel for the defendant did not ask to look at them, but allowed them to be put in and taken as read. He subsequently found out that they were not certified copies, and then made the objection. At that time the plaintiff's counsel was not in Court, but no doubt, if he had been, he would have removed the objection, for he had a witness who could have proved that they were examined copies. Under these circumstances we are to determine whether or no these documents were admissible as certified copies. For my own part, I think that the rule with reference to the course at *Nisi Prius* ought to be strictly acted on. If counsel have allowed,



without objection, a paper to be put in as proved, they should be bound by it, unless there are strong circumstances, to shew that the verdict ought not to stand. If, indeed, the circumstances disclose bad faith, or that the document itself was not admissible in evidence, there might be reason for the Court rejecting it and granting a new trial. But in this case there is neither of those elements: the whole matter was in perfectly good faith, and the documents were admissible. Under these circumstances, if we came to the conclusion that these documents were not certified copies, we should cause great injustice. The writ was certainly a certified copy: it was not only in the ordinary form, but it was a document coming from the office where the original was kept, and containing a memorandum signed by a clerk to the effect that it was a certified copy. I think that the point does not arise, the objection not having been taken at the time. The same remarks apply to the return. Then it only remains to consider the register. No objection was raised as to whether the document produced was or was not a certified copy; the only question was whether the original was of such a character that it would be evidence if produced from the proper custody. It was laid down by Lord Holt in *Lynche v. Clerke* (a), and adopted in a note in Douglas's Reports (b), "that wherever an original is of a public nature and would be evidence if produced, an immediate sworn copy thereof will be evidence." The question therefore is, whether this document is of a public nature, such as to be evidence *per se* if produced from the proper custody. It has been argued that it is not, and that it would be necessary to prove the signature of the town clerk. But no authority was cited for that, and it seems to me that it is a document of such a public nature that it would prove itself if brought from the proper custody. It

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(a) 2 Salk. 154.

(b) Vol. 2, p. 594.



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is a document in which the public are concerned : it is kept in pursuance of an act of parliament, and confided to the custody of a particular officer for a public purpose, and moreover the Act provides that any person may have a copy of it. Public convenience requires that a copy should be admissible in evidence. For these reasons I think that the three documents were admissible in evidence. A further point was raised, viz., that there was no evidence of notice. The truth is that the return made by the sheriff was evidence of notice. I do not dwell upon that, because I am of opinion that in order to constitute this offence under the statute, it was not necessary to prove all the minute formalities necessary before an election can take place. As to the last point, viz., whether parol evidence without the documentary would be sufficient to sustain the verdict, it is unnecessary to give an opinion. It was argued that if these documents are not admissible, still the Court will not grant a new trial, because there was abundant evidence without them, and they could have had no effect on the minds of the jury. As we all think they were admissible, it is not necessary to say any more on that point. I agree with the Lord Chief Baron, that we ought to act upon what may be fairly presumed to be the meaning of the language of the witness, and not to take every sentence by itself without reference to the subject-matter. For these reasons I think that the rule ought to be discharged.

Rule discharged.

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so much, but if not, then the costs de bonis propriis. But if it be held that an executor is a judgment debtor within that enactment, this consequence will follow, that a debt due to him in his own right might be attached for the testator's debt. [*Martin*, B.—In Roll. Abridg. tit. Customs of London (K.) 2, it is said that a debt due to an administrator may be attached.] In *Baynard v. Nicolls* (a), it was held that an executor of a judgment creditor is not entitled to attach a debt due to the judgment debtor before he has made himself a party to the judgment. Lord *Campbell* there said, "I would by no means give a forced construction to enactments against garnishees: that would often lead to molestation of third parties without much benefit to any one." [*Bramwell*, B.—According to the old form, in an action by and against executors, the declaration should be in the detinet only, though sometimes an executor might be sued in the debet and detinet, as in *Hargrave's Case* (b).]—Secondly, if this rule be made absolute it would disturb the due administration of the testator's assets. After a decree in an administration suit, a Court of equity will restrain the creditors from proceeding at law; and if a creditor, after notice of the decree, obtains judgment against the executor, and takes in execution the testator's assets, he will be compelled to restore them: *Clarke v. The Earl of Ormonde* (c). Here the judgment creditor is proceeding after notice of the decree, and this attachment is only another mode of enforcing execution. [*Bramwell*, B.—Suppose a creditor issued a fi. fa., and afterwards there was a decree in an administration suit, would he be restrained from proceeding with his execution?] *Kent v. Pickering* (d) decided that after a decree for the administration of the assets of a testator, the Court will interfere so far as to give

(a) 5 F. & B. 59.

(b) 5 Rep. 65.

(c) Jacob, 722.

(d) 5 Sim. 569.



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are, common carriers of goods and chattels, to wit, from London to Torquay, Bath, Taunton, Exeter, Trowbridge, Plymouth, Bristol, Reading, Yeovil and Totnes respectively, and from Bristol to Portsmouth and Taunton respectively, and from Salisbury to Plymouth, and from Oxford to Yeovil, and from Frome to Trowbridge; and thereupon the plaintiffs caused to be delivered to the defendants, and the defendants then accepted and received of and from the plaintiffs, certain boxes, parcels, bales, hampers, and other packages, containing goods and chattels of great value, to be safely and securely carried and conveyed by the defendants from London to Torquay, Bath, Taunton, Exeter, Trowbridge, Plymouth, Bristol, Reading, Yeovil and Totnes respectively, and from Bristol to Portsmouth and Taunton respectively, and from Salisbury to Plymouth, and from Oxford to Yeovil, and from Frome to Trowbridge, and then, to wit at Torquay, Bath, &c., to be respectively safely and securely delivered for the plaintiffs for certain reasonable reward to the defendants in that behalf. Yet the defendants, not regarding their duty as such common carriers, did not nor would safely or securely carry or convey the said boxes, parcels, &c., respectively, or any of them, to Torquay, Bath, Taunton, Exeter, Trowbridge, Plymouth, Bristol, Reading, Yeovil, Totnes and Portsmouth aforesaid respectively; nor there, to wit, at Torquay, Bath, &c., respectively, safely or securely deliver the same to the plaintiffs; but, on the contrary, the defendants so carelessly and negligently behaved and conducted themselves in the premises, that by and through the negligence, carelessness and default of the defendants in the premises, the said boxes, parcels, &c., and their contents, became and were damaged, broken, spoiled and wholly lost to the plaintiffs.

The plaintiffs, in pursuance of a Judge's order, delivered



particulars of their claim for damage, injury and loss, amounting to 67*l*. 10*s*. 1*d*. The particulars, which were in the following form, comprised twenty-six items:—

|                      |                  |                              |   |    |    |
|----------------------|------------------|------------------------------|---|----|----|
| London to Bath .     | 1859.<br>March 4 | Damage to Prints . . .       | £ | s. | d. |
|                      |                  |                              |   | 14 | 0  |
| Torquay              | June 25          | Damage to Box Glass . .      |   | 18 | 0  |
| &c.                  |                  | &c.                          |   |    |    |
| Salisbury, Plymouth  | June 1           | By delay to 2 Hampers Plants | 5 | 0  | 0  |
| Bristol, Portsmouth, | Augt. 12         | Value of Pun. Treacle lost   | 7 | 15 | 6  |
| &c.                  |                  | &c.                          |   |    |    |

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The defendants pleaded payment of 55*l*. into Court, and that such sum was enough to satisfy the claims of the plaintiffs in respect of the matters therein pleaded. Thereupon the plaintiffs obtained the order now sought to be rescinded.

The affidavit in answer to the rule stated, that the items of the particulars of demand consisted of sums actually paid by the plaintiffs to the owners of the goods in satisfaction of claims for loss or damage to such goods whilst in the possession of the defendants as carriers: that without such particulars it was impossible for the plaintiffs to know which of the twenty-six items of the plaintiffs' claim are disputed by the defendants; and without such particulars the plaintiffs would have to be prepared to prove every item on the trial, and to bring up several witnesses from different parts of the country, at a considerable expense, to prove every item.

*C. Pollock* shewed cause.—The difficulty would not arise under the old form of declaration because it would have contained a distinct count for each item of claim,



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and the defendants must have specified in respect of which counts they paid the money into Court. [*Martin*, B.—I have had similar cases before me at Chambers, and I thought it reasonable that the defendants should give the particulars.] Unless the application is granted, the plaintiffs will be bound by their particulars, whilst the defendants may apply their payment to any item of claim, so as to meet the plaintiffs' proof.

*Field*, in support of the rule.—The declaration, in fact, comprises twenty-six counts, and but for the Common Law Procedure Act, 1852, would have been bad on special demurrer. Before that Act the plaintiffs must either have brought separate actions, or had separate counts for each alleged grievance. Upon a declaration framed as this is, the defendants are entitled, as a matter of right, to particulars of the plaintiffs' claim. Since the plaintiffs have chosen to include twenty-six counts in one, the defendants have a right to pay money into Court without specifying the particular count upon which it is paid. Payment into Court is a statutory right. [*Channell*, B.—So is a set-off, but particulars must be given. *Pollock*, C. B.—The mere payment into Court does not lead to the settlement of the action, nor simplify the issue; for if the particulars are not given, the plaintiffs must prove every item of claim. *Bramwell*, B.—As the matter stands, the plaintiffs must prove damage above the amount paid into Court; but if particulars are given, and the plaintiffs shew that upon any one item of damage they are entitled to a shilling more than the sum mentioned in the particulars, they would be entitled to the verdict, although the sum paid into Court exceeded the amount of damage which they proved. *Martin*, B.—The plaintiffs only say, "Tell us upon which



count you pay the money into Court." If particulars are not given, the plaintiffs must be prepared to prove every item, because the defendants may apply the payments as they think fit.] The plea is in accordance with the form prescribed by the 71st section of the Common Law Procedure Act, 1852, viz., "that the said sum is enough to satisfy the claim of the plaintiff *in respect of the matter herein pleaded to.*" [Martin, B.—Suppose a count in trespass *quare clausum fregit* is joined with a count in trover, and the defendant pleads to the whole, payment into Court, may he not be compelled to specify upon which count he pays the money? Channell, B.—In *Ireland v. Thompson* (a), the defendant pleaded, with several other pleas, payment of 5000*l.* in satisfaction of the plaintiff's demand, and the Court made absolute a rule to discharge the rule to plead several matters, unless the defendant delivered particulars of the payment.] In *Phipps v. Sothorn* (b) the Court refused to compel a defendant to deliver particulars of payment. It was argued that the case was analogous to the plea of set-off; but Parke, B., said, "There is no such analogy as that contended for. A plea of set-off is in effect a cross action, and the plaintiff has a right to know what claim the defendant has against him; but here you seek to make the defendant disclose the evidence in support of his answer to the action." There is no instance of such an application as the present.

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged.

MARTIN, B.—I am of the same opinion.

BRAMWELL, B.—I do not say that the rule should be

(a) 4 Bing. N. C. 716.

(b) 8 Dowl. P. C. 208.



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absolute. The application is of a novel character, and it may be that the effect of setting aside the order of my brother *Channell* might compel the plaintiffs to have twenty-six separate counts. If the declaration had merely contained the common counts for goods sold and delivered, I should have doubted the power of the Court to order particulars. It would be as reasonable to require particulars of payment before action as after it, but it is never done.

Rule discharged.

July 6.

ALEXANDER v. WORMAN.

The plaintiff was surveyor to a Benefit Building Society, of which the defendant was one of the managing directors. By a Rule of the Society, it was declared that its object was to advance money to its members to enable them to buy or build houses. By another Rule, the surveyor shall examine and report upon houses

**ACTION** for work done and materials provided by the plaintiff for the defendant, and for commission payable from the defendant to the plaintiff in respect thereof.

Plea.—Never indebted.

At the trial, before *Blackburn, J.*, at the Surrey Summer Assizes, 1859, it appeared that the plaintiff, who was a surveyor, sought to recover from the defendant the sum of 59*l.* 10*s.*, being his commission at 3½ per cent., for preparing plans, specifications, &c., and superintending the erection of six houses in the Midhurst Road, Bethnal Green, Middlesex. The defendant was a shareholder of a Benefit Building Society, called "The Second East London People's Co-operative Benefit Building Society." At a general meeting of the members of the Society, held on and other property "previous to money being advanced thereon by the Society, and shall transact all other business of the Society, &c., for which he shall receive out of the funds thereof, a fair and reasonable remuneration." The directors took on lease a piece of land on which they covenanted to build six houses. At a meeting of the directors, at which the defendant was present, it was resolved that the plaintiff be instructed to prepare plans and specifications for the houses. At another meeting it was resolved that the plaintiff be paid a commission of 3½ per cent. on the outlay. The plaintiff prepared the plans and specifications and superintended the building, but before it was finished the Society became insolvent. The plaintiff made several applications "to the directors of the Society" for payment of his commission but without success, and, the Society having become extinct, he brought an action against the defendant.—*Held*, that the contract was not with the defendant personally but with the Society, and that the plaintiff's only right to remuneration was out of the Society's funds: Per *Pollock, C. B., Martin, B., and Channell, B.* *Bramwell, B.*, dissentiente.



the 4th of March, 1858, at which the plaintiff and defendant were present, it was resolved that the defendant and four other persons "become members of the committee:" also that the plaintiff "be the surveyor of the Society." At a committee meeting, held on the 20th April, 1858, at which the plaintiff and defendant were present, it was proposed by the defendant, and resolved, "that the plaintiff be instructed to supply Mr. Rogers" (the solicitor of the Society) "with plans and specifications for six houses in Midhurst Road." The plaintiff accordingly prepared drawings and specifications for the houses. On the 27th of April the plaintiff attended another committee meeting, at which the defendant was not present, and reported that he had prepared the plans; when it was resolved "that the surveyor be instructed to obtain tenders from six builders for the erection of six houses in Midhurst Road." On the 4th of May the plaintiff attended another committee meeting, at which the defendant was present, when several tenders from builders were opened; and the tender of one "Green being the lowest, consideration of same was adjourned for the attendance of Mr. Beetson" (one of the directors). The plaintiff was asked what his commission would be, and he said  $3\frac{1}{2}$  per cent. on the outlay, which was agreed to. On the 11th of May the plaintiff attended another committee meeting, at which the defendant was present, when the minutes of the last meeting were "read and received as correctly entered;" and it was resolved that "Green's tender for building six houses in Midhurst Road for 1550*l.* be accepted." At that meeting the plaintiff received instructions to tell Green to proceed with the works. On the 18th of May the plaintiff forwarded a report of the progress of the works, addressed "To the Directors of the Second East London People's Co-operative Benefit Building So-

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ciety;" and he informed them that he expected the builder would want from 150*l.* to 200*l.* in about a month's time. On the 25th of May the plaintiff made another report of the progress of the works, and he informed the directors that he would give them a fortnight's notice of any monies being required. On the 15th of June the plaintiff wrote to the chairman of directors a letter stating that 200*l.* would be required by the builders in a fortnight. On the 30th of June the plaintiff gave to Green, the builder, the following certificate, addressed, "To the Directors of the Second East London Benefit Building Society:"—"I hereby certify that Mr. George Green is entitled to 300*l.* for works done as per contract at Midhurst Road, Bethnal Green, on your account." On the 2nd of July the plaintiff wrote to the directors informing them that the certificate would be presented. Similar certificates were afterwards given, the amount certified being in the whole 900*l.* The money was not paid, and the builder refused to proceed with the works. A correspondence on the subject then took place between the plaintiff and the directors. On the 23rd of August, 1858, the plaintiff wrote a letter to the directors in which he said, "You must also be aware that the non-payment of the contract, as regards money, places me in a very awkward position, completely destroying the relative positions which ought to exist between builder and architect. With regard to myself, I should feel obliged if you would remit me 25*l.* on account, or your acceptance for that sum at two months would suit me." In reply, the plaintiff was informed that the committee had made an arrangement with the builder. On the 13th of September, 1858, the plaintiff again wrote to the directors a letter, which concluded as follows—"Allow me to call your attention to my request, as you must be aware



that I have been working now for a long time and have received no remuneration whatever. I trust you will see the justice of granting my request." By a resolution of the 16th September these houses were allotted to the defendant and five other directors. Afterwards it was proposed, at a meeting of the directors, to give up the houses to Green, the builder; and by an agreement dated the 8th November, 1858, between Green of the one part, and the defendant and Legge and Roper (two directors) of the other part, after reciting "that a certain Society enrolled as The Second East London People's Co-operative Benefit Building Society, of which the defendant, Legge and Roper are members of the committee, is indebted to Green" &c., the defendant, Legge and Roper assigned to Green the six houses in Midhurst Road in satisfaction of his debt. On the 29th November the plaintiff sent his account, headed "To the Directors of the Second East London People's Co-operative Benefit Building Society," in the following letter addressed to the directors—"Houses in Midhurst Road.—Having understood from Mr. Rogers that you have transferred these houses to the builder, I beg to inclose my charges herein, and shall feel obliged by an immediate settlement. I consider I have been very unfairly treated." The Society, having no funds, became extinct, and the plaintiff then brought this action against the defendant. The ground on which the six houses were built was leased to the defendant, Legge and Roper by an indenture dated the 11th of May, 1858, and made between one Hammack of the first part, and the defendant, Legge and Roper of the second part; and it contained a covenant as follows—"And the said parties hereto of the second part do, and each of them doth, covenant &c. that they will at their own expense build on the said ground &c. six houses in a workmanlike manner" &c. By the

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Rules of the Society, which were duly certified and enrolled, it was thus provided :—

“ Objects of the Association.

“ 1. That this Association be called ‘The Second East London People’s Co-operative Benefit Building Society,’ and that its object is to raise by the subscriptions of its members, and on shares of 30*l.* each, a fund for the purpose of enabling each member to receive out of the funds of the Society the full amount of his share or shares, to erect or purchase a dwelling house or houses, or other real or leasehold property.”

“ Management.

“ 3. That this Society shall be managed by a committee of not more than twelve members, three or more trustees, and a secretary, &c. There shall also be a solicitor and surveyor, who shall respectively transact the business of this Society under the direction of the committee.”

“ Surveyor.

“ 29. Shall examine all houses and other property previous to any money being advanced thereon by the Society, and make in writing a correct report thereof and of the value thereof to the committee, and shall transact all other business of the Society that may require the assistance of a surveyor, for which he shall receive out of the funds thereof a fair and reasonable remuneration; and should any dispute arise as to his charges the same shall be referred to the decision of the committee, which shall be final.”

It was submitted, on behalf of the defendant, that the work was done by the plaintiff as surveyor of the Society, and that the defendant was not personally liable. The learned Judge was of that opinion, and directed a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him for 5*9**l.* 10*s.* all points to be open to either party, and the Court to draw inferences of fact.



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personally pledged himself to pay for this work ; but it was done on the understanding that the plaintiff was to look to the funds of the Society. [*Bramwell*, B.—How is he to get his remuneration ?] By suing the treasurer or trustees, under the 21st section of the 10 Geo. 4, c. 56. The plaintiff always treated this work as done by him for the Society, in the performance of his duty as their surveyor: and he did not make any claim on the defendant until after the Society failed. *Braithwaite v. Schofield* (a) was decided before the 10 Geo. 4, c. 56, passed, and it only established that where a number of persons are associated together for a particular object, and work is done in pursuance of a resolution by them, the ordinary rule applies that the persons who gave the order for the work must pay for it. [*Pollock*, C. B.—The question is whether the plaintiff was acting as the surveyor of the Society or in his individual capacity.] *Kelsall v. Tyler* (b) does not affect this question. *Burton v. Tonnahill* (c) is an authority that no action can be maintained against the individual members for work done for the Society. It is the duty of the plaintiff, who seeks to make the defendant responsible, to establish his liability. The plaintiff must shew either that the work was done on the credit of the defendant, or that the defendant, conjointly with the other directors, undertook to pay the plaintiff. The mere circumstance of the defendant having acted as a director of the Society, and given orders on behalf of the Society, is not sufficient to render him personally responsible. Assuming that the contract was ultra vires, it does not therefore follow that the defendant is personally liable.

*Purby*, Serjt., and *Larton*, in support of the rule.—The

(a) 9 B. & C. 401

(b) 11 Exch. 513.

(c) 5 E. & B. 797.



plaintiff proved an ordinary contract, viz., that he was employed to do the work, that the defendant was one of the persons who ordered it, and that the work was done. Therefore, *prima facie*, the defendant is liable to pay for it. Then, how does he seek to discharge himself from that liability? Reliance is placed on the 29th Rule; but that does not say that the surveyor is to be paid *exclusively* out of the funds of the Society. The object of that provision was to enable the directors to appropriate the funds to such a purpose: and now it is conceded that there are no funds with which the surveyor can be paid. *Braithwaite v. Schofield* (a) is a conclusive authority as to the common law liability of the defendant. In *Burton v. Tannahill* (b), it did not appear that the defendant personally gave orders for the work; and, moreover, the common law liability of the members of the Society was annulled by the prohibitory clause, (sect. 1) of the 17 & 18 Vict. c. 25. Further, the plaintiff was not employed to do the business of the Society. By rule 1 the object of the Society was to raise a fund for the purpose of enabling members to purchase houses. The directors had no power to build. The employment of the plaintiff to prepare plans and specifications, and to superintend the building of houses was *ultra vires*, and, therefore, the directors who employed him are personally liable. In *Grimes v. Harrison* (c), the Master of the Rolls points out the distinction between Land Societies and Building Societies. *Kelsall v. Tyler* (d) is a distinct authority that the directors of a Building Society have no power to enter into contracts collateral to the purpose for which the Society was formed. Again, the plaintiff was not employed as surveyor, but as architect. A surveyor is defined in Johnson's Dictionary as "overseer, one placed to superintend

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(a) 9 B. &amp; C. 401.

(b) 5 E. &amp; B. 797.

(c) 26 Beav. 435.

(d) 11 Exch. 513.



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others." The duties of the surveyor are prescribed in the 29th Rule; he is to examine and report upon property, previous to money being advanced thereon, and to transact all other business of the Society of a like nature. The Rules make no mention of an architect. It lies on the defendant to get rid of his liability, and what was passing in his mind is immaterial. If the plaintiff had brought his action against the Society they would have said, "You must sue the persons who employed you, the work was not done for the Society."

*Cur. adv. vult.*

The learned Judges having differed in opinion, the following judgments were now delivered.

BRAMWELL, B.—There appears to be three questions in this case.—First, did the plaintiff enter into any contract? Secondly, if he did, was it with the defendant? Thirdly, if so, what was it? Now, the plaintiff is an architect: he was ordered to do work in the way of his profession, and he did it. Presumably, therefore, he is to be paid for it, which involves the existence of some contract with some one. But it is said, "no, he trusted the Society which was interested in the work, a Building Society, or their funds." But I know no way in which a Society, not a corporation and not having an officer to be sued for it, can be got at or sued, nor how its funds can be reached, except by a contract with one or more individuals upon which the individual or individuals is or are absolutely or contingently liable. Now this Society is not a corporation and has no public officer. There is no pretence for saying that an action can be maintained under the 21st section of 10 Geo. 4, c. 36, which obviously relates to the property of the Society and not to contracts which its members may think fit to enter into. Of course it was competent for the plaintiff to agree to do his work gratis, or



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have mentioned, there was a Building Society—the defendant a director—as such he gave the order—the plaintiff was appointed surveyor, and accepted the office. By 10 Geo. 4, c. 56, s. 8 (which by the 6 & 7 Wm. 4, c. 32, regulates these Societies), all officers are deemed to have notice of the Rules of the Society, and by one of the Rules the surveyor is to be paid out of the funds; then, there being no funds, the plaintiff is not to be paid. Now, I think the first answer to this is that given by my brother *Parry*, viz., that this Rule is a rule not affecting the surveyor, but a rule of the members authorizing such an application of the funds. However, it may be otherwise; but there is another answer. This work was not done by the plaintiff as surveyor, not done by him as an officer of the Society. The Society had no authority to build—that is clear, and has been decided. The surveyor's business is that which his name indicates, he is to survey those buildings which are to be the security of the Society, a work which is wholly different from that of an architect making drawings, plans, elevations and specifications. It could not be done by him as their officer, if they could not, as a Society, do that on which they employed him. Therefore the Rule does not apply to this work. The ordering of it was *ultra vires*; and if the plaintiff sought to enforce a claim on the Society, or funds of the Society, supposing by some contrivance he could do so, he might be met by this objection.

But it is said he must be taken to do this work on the same terms as he worked as surveyor, and if he had actual notice of the Rule that might be; but he had not. The statute only means he shall be deemed as such officer to have notice, and it seems to me as unreasonable to hold he is bound by the Rule, as it would be so to hold, if he had supplied bricks for the building. I cannot but think, therefore, that this is the common case of work ordered, by the defendant, of



the plaintiff in the way of his profession, and done by him; and that, therefore, he is entitled to be paid for it. In fact it is the case of *Braithwaite v. Schofield* (a), only stronger. It is true that case was before 6 & 7 Wm. 4, c. 32, but what difference does that statute make? It neither gives a right nor takes one away. The opinions expressed in *Burton v. Tannahill* (b), are to the same effect. I think the rule should be made absolute.

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MARTIN, B.—The judgment which I am about to deliver is that of the Lord Chief Baron, my brother *Channell* and myself.

The plaintiff in this case was the surveyor to a Building Society. He was an officer named in the Rules; and by one of them his compensation was to be paid out of the funds of the Society. The object of the Society was to advance money to its members, to enable them to buy or build houses. The directors, of whom the defendant was one, leased a piece of land upon which they proposed to build. At one of the regular meetings of the Society the plaintiff was directed to prepare plans, &c., and a resolution was entered in a book of the Society to this effect. At another meeting a resolution was made and duly entered, that the compensation to the plaintiff should be 3*l*. per cent. on the outlay, for which per centage the action was brought. The plaintiff made the plans and superintended the building for some time, but ultimately the Society became insolvent. The plaintiff made several applications for payment, but always to the secretary; and until the Society was broken up he made no demand upon the defendant, or any other of the directors, that they should pay him out of their own funds. By a section in one of the acts of parliament regulating such Societies, the surveyor is to be deemed to have notice of the rules.

(a) 9 B. & C. 401.

(b) 5 E. & B. 797.



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The cause was tried before my brother *Blackburn* at Croydon, last Summer Assizes, when he directed a nonsuit, giving the plaintiff leave to move to enter a verdict. A rule was granted for the purpose, and the Lord Chief Baron, Baron *Channell* and myself think it ought to be discharged.

The question is much more one of fact than of law, and the reasons for our judgment are these. We think the onus of proof in this, as in every other case for work and labour, is upon the plaintiff, and that he is bound to satisfy the jury either, first, that the defendant contracted to pay, by which we mean that he understood that he himself, or that he in conjunction with the other directors, was to pay the plaintiff for his labour. Such a contract might have been proved in an infinite variety of ways; but we think it clear upon the evidence in this case that the defendant thought that he was dealing with an officer of the Society and not with a surveyor, whom he was to pay out of his own private funds either solely or in conjunction with others. By the Rule the surveyor was to be paid out of the funds of the Society, and although the building houses was not within the object of the Society as stated in the Rules, it seems to us that both the plaintiff and the defendant and his co-directors acted as if it was, and in our opinion the plaintiff failed to prove that the defendant contracted to pay him in the sense above mentioned.

But, secondly, we quite agree that if the defendant had so conducted himself as reasonably to create in the plaintiff's mind the belief that he was to be paid by the defendant for his labour, it is quite immaterial whether the defendant himself understood that he was to pay. To create a liability of the kind, however, it is of the very essence of it to establish that the plaintiff himself understood and believed that he was to be paid by the defendant, but the evidence



satisfies us that he had no such belief, and that until the Society was broken up he looked to the funds of the Society for payment, and not to the defendant or his co-directors at all.

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We think it a mistake to suppose that, in Societies of the kind, the surveyor or secretary or the officers do work and labour upon the same terms as professional men of their class ordinarily do. They generally have a much greater interest in them than the directors, and in the great majority of cases are the individuals who get them up, and at whose request the directors consent to accept the office and take upon themselves the liabilities and duties of their situation; and it is to us very clear that such officers discharge duties and perform services with the understanding on all hands that they are to be remunerated out of the funds, and that if the funds fail the officers must remain unpaid.

Rule discharged.

## IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

ABBOTT v. FEARY.

June 20.

**T**HIS was an action on a bill of exchange drawn by J. T. Harradine upon the defendant, accepted by him, and indorsed to the plaintiff.—The defendant pleaded that he did not accept. At the trial of the cause, before *Pollock*, C. B., it appeared that the defence was that the bill was a

The Court of Exchequer having granted a rule nisi, to enter a verdict for the defendant on a point reserved at the trial, or for a new trial on the ground of misdirection and that the verdict was against evidence, afterwards made the rule absolute to the extent of granting a new trial. No leave to appeal was given.—*Held*, by the Court of Exchequer Chamber, that no appeal lay. *Williams, J.*, dissentiente.



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forgery, but evidence was given that the defendant had paid similar bills. The learned Judge directed the jury that if the bill had been signed with the name of the defendant in a manner which had been accredited by the conduct of the defendant, and the plaintiff knew of such accrediting, and accordingly gave credit to such signature, they ought to find a verdict for the plaintiff. The jury found a verdict for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him if the Court should be of opinion that there was no evidence to go to the jury that would justify their finding a verdict for the plaintiff.

On the 23rd of May, 1857, the Court of Exchequer, on the motion of the defendant, granted a rule to shew cause why the verdict should not be set aside, and a verdict entered for the defendant, on the ground that there was no evidence of authority, general or special, from the defendant to accept the bill, and no representation of any authority to the plaintiff; or why the verdict should not be set aside, and a new trial had, for misdirection, or that the verdict was against evidence. The Court of Exchequer, on the 24th of November, 1857, made the rule absolute to the extent of setting aside the verdict and ordering a new trial.

Notice of appeal against this decision was given by the defendant, according to the Common Law Procedure Act, 1854. The case on appeal further stated that the plaintiff contended, amongst other things, that the defendant was not entitled to appeal from this decision.

*O' Malley* (with whom was *Couch*), for the appellant.— This was a rule to enter a verdict upon a point reserved at the trial, and the Court of Exchequer has given a judgment discharging the rule so far as it relates to the entry of a verdict for the defendant on the point reserved. The



appellant has a right to be heard to say that the judgment was erroneous in that respect. Under the circumstances of this case the rule nisi should be treated as consisting of two distinct rules, rather than as being a rule in the alternative. If, looking at the whole rule, the judgment of the Court below is wrong, there is a right of appeal.

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*Hawkins*, for the respondent.—The case falls, not within the 34th, but within the 35th section of the Common Law Procedure Act, 1854. No appeal lies against the rule for a new trial except by leave of the Court, which has not been obtained. [*Williams*, J.—Is not the defendant “decided against” on the points reserved at the trial?]

WIGHTMAN, J.—It appears to me that we cannot entertain this appeal. The 34th section of the Common Law Procedure Act, 1854, enacts, that “in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to shew cause be refused, or granted and then discharged, or made absolute, the party decided against may appeal.” That is applicable to a case where the rule is discharged or made absolute on the point on which it was obtained. Where the parties obtain a rule in the alternative, as to enter a nonsuit or for a new trial, and the Court accepts one of the alternatives, the right to appeal under the 34th section is gone. The parties give the Court authority to adopt either alternative. The case is within the 35th section. The plaintiff could not have appealed. The defendant has the advantage of a new trial, and the rule to enter a nonsuit drops. The 34th section was not intended to apply to a case of this kind.

WILLIAMS, J.—I regret that I cannot agree with the rest of the Court. I think that we ought to hear the appeal. At



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the close of the plaintiff's case the defendant's counsel objected that there was no case, and said that the Judge ought to direct the jury to find for the defendant. It was agreed that, instead of the Judge deciding it, the question should be reserved for the Court. It must be considered what would have been the case if there had been simply an application by the defendant to enter a verdict or nonsuit. It may be argued that even under those circumstances the Court might say, "Instead of that we will direct a new trial." But I consider that the agreement of the parties put them in a position to ask for judgment on the point reserved; and that it would be departing from the footing on which they stand, to say that the matter is one for further investigation. The agreement at the trial was one which, I think, the parties had a right to have carried into effect. Then, does it make any difference that the rule to enter a verdict also asks for a new trial? I think not. It appears to me that the rule is not in the alternative; which it would be if the meaning were that the defendant would be content with one or the other of two things. The defendant in effect asks for a decision on a point of law, which, if decided in his favour, by a convention between the parties, is to entitle him to a verdict. Then he goes on to say, "If I am wrong on that point, I am at least entitled to a new trial." Why should the defendant lose his right to insist on the first point because he is diffident as to his success upon it? I think the Court was bound to have decided it. There is no reason why the defendant should be deprived of his right, because he also asks for something else, if he is now able to sustain that right. If, in consequence of the rule being in form alternative, or the defendant's delay in proceeding with the appeal, notice of trial has been given and costs incurred by the plaintiff, it may be proper to make the defendant pay the costs of such notice of trial, or other expenses rendered



unnecessary. Then we come to the question upon the words of the statute. The case appears to me to be exactly within the words of the 34th section. The point was reserved, a rule was granted, which, so far as regards the point reserved, was discharged, and the defendant has been "decided against" upon the point reserved; therefore I think he has a right to appeal.

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CROMPTON, J.—I am disposed to agree with my brother *Williams* in thinking that it is not material whether the rule simply asks to enter a verdict on the point reserved, or whether it also asks for a new trial. But I think that the right given by these sections is subordinate to the inherent power of the Court to grant a new trial whenever the justice of the case requires it. In this Court we are confined to matters of law. It is important, therefore, not to interfere with the discretion of the Courts in granting new trials. In the present case the Court thought that sufficient evidence had not been brought before the jury, and they, therefore, exercised their inherent power to grant a new trial. I agree that what took place at *Nisi Prius* was in the nature of an agreement that the Court should have the power to enter a verdict for either party. But the appellant cannot be in a better position than if the verdict had been actually entered for him; and I do not see why the arrangement should interfere with the discretionary power of the Court.

WILLES, J.—I am of the same opinion. The arrangement was no more absolute or final than other arrangements, which are subject to be set aside or disregarded on the ground of mistake or fraud. If the Court finds that facts exist, which if brought to the knowledge of either party would have prevented the arrangement, it is the duty of the Court not to hold itself bound by such arrangement. There



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is a clear and sound distinction between the superior Courts and Courts of inferior jurisdiction. While inferior Courts have no power, except by statute, to grant new trials, the superior Courts possess such power where the first trial has been unsatisfactory or abortive. In *Wade v. Simeon* (a) a Judge's order was obtained by *consent*, that, upon payment of the debt and costs on or before the 14th of December, all further proceedings should be stayed, and in default of payment the plaintiff should be at liberty to sign judgment. The Court of Exchequer held, that notwithstanding the order it had power to interfere, and ought to interfere if it perceived that the process and jurisdiction of the Court were about to be used for purposes not consistent with justice. I cannot help thinking that if the Courts were bound to act blindly on arrangements of this kind it would be abrogating a most wholesome jurisdiction. There appears to be express authority that the Courts are not absolutely bound by such a transaction as that in the present case. I agree that the question is the same as if the rule nisi had asked only to enter the verdict. In either case I think that the Court may, in the exercise of its discretion, grant a new trial. Therefore I think that we cannot entertain the appeal.

BLACKBURN, J.—I also think that an appeal does not lie. The case is the same as if the rule had been simply to enter a verdict for the defendant. The true bargain between the parties at the trial was that a verdict should be entered subject to the opinion of the Court on the evidence as it then stood: but that arrangement was subject to the inherent right of the Court to set aside the verdict for any purpose of justice. In cases of leave reserved to enter a verdict I have always understood that the verdict

(a) 13 M. & W. 647.



may be set aside on any other ground, and where it appears that the rule ought to be moulded, the Court may so deal with it. If, therefore, the Court finds that the facts at the trial, or any other matters, render it proper that they should do so, they may say "there ought not to be a verdict entered for the defendant, but the case must be further inquired into." We must, however, decide this as a matter of law on the construction of the statute, and it is to be observed that the words of the 34th and 35th sections do not apply to the case where the rule is not "discharged or made absolute" but a middle course is taken.

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KEATING, J.—I concur in thinking that no appeal lies, because the rule has not been "discharged or made absolute." The Court have taken a middle course. If the defendant could appeal it appears to me that great inconvenience, and even injustice, would be the result. The defendant might prosecute his appeal in this Court, and afterwards in the House of Lords, and during all the time so occupied the plaintiff would have the rule for the new trial hanging over his head.

*Hawkins* applied for costs.

WIGHTMAN, J.—We cannot give costs. All that we can say is that we do not entertain the appeal.





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## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

STURGIS, Provisional Assignee of HARTLEY, an Insolvent Debtor, *v.* SIR WILLIAM DARELL, Bart., Administrator, with the will annexed, of JOHN Earl of EGDMONT.

June 19.

In May, 1831, the obligee of a bond brought an action against the obligor. After notice of trial the action abated by the death of the obligor in December 1835. The obligor left a will, which was not proved by the executor named therein. On the 18th of May, 1857, administration of the goods and effects of the obligor with the will annexed was granted to the present defendant. In March, 1852, the obligee petitioned the Insolvent Debtors' Court, and his effects vested in the provisional assignee, the present plaintiff, who commenced an action on the bond against the defendant on the 17th of May, 1858.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the right of action was not barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 42, s. 3.

THIS was a proceeding in error upon the judgment of the Court of Exchequer upon the special case reported 4 H. & N. 622.

*R. E. Turner* (with whom was *R. G. Williams*), for the defendant (*a*).—The question in this case is whether the same equitable construction is to be put upon the 3rd section of the 3 & 4 Wm. 4, c. 42, which has been put upon the 4th section of the 21 Jac. 1, c. 16, in the cases collected in the notes to *Hodsden v. Harridge* (*b*). Now the statute of 21 Jac. 1, c. 16, is an ancient statute, and a wider and looser rule of construction has been applied to ancient than to modern statutes; with respect to which the established rule is to construe them literally, and to confine them to the cases specified in them, according to the rules enunciated by Lord Tenterden in *Brandling v. Barrington* (*c*) and *Cole-ridge, J.*, in *Gwynne v. Burnell* (*d*). Secondly, there is

(*a*) June 18. Before *Wightman, J.*, *Williams, J.*, *Crompton, J.*, *Willes, J.*, *Byles, J.*, *Blackburn, J.*, and *Keating, J.*

(*b*) 2 Wms. Saund. 64 *a. b.*

(*c*) 6 B. & C. 467. 475.

(*d*) 6 Bing. N. C. 453. 476.



evidence in the 3rd section of the 3 & 4 Wm. 4, c. 42, that this equitable construction is not to be applied to it. A period of limitation is fixed in actions for penalties, and, as penal statutes are to be strictly construed, an equitable construction will not be put upon this part of the section: *Adam v. The Inhabitants of Bristol* (a). A different construction cannot be put upon the same words as applicable to different parts of the same section. The Court will not construe one part of the section in one way and one in another. [*Williams, J.*, referred to *Knight v. Bate* (b).] The Courts have unwillingly followed the construction given by the earlier cases to this section of 21 Jac. 1, c. 16: *Curlewis v. Earl of Mornington* (c) and *Rhodes v. Smethurst* (d). Lastly, the Court will, if in any doubt, consider the object and spirit of statutes of limitation, viz. ut sit finis litium: Story's Conflict of Laws, s. 576.

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*H. Mills*, contra, was not called upon.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WIGHTMAN, J.—We are of opinion that the judgment of the Court of Exchequer should be affirmed. If the action in the present case, instead of being upon a bond, had been upon a promissory note, the question would have to be determined by the construction to be put upon the 3rd and 4th sections of the 21 Jac. 1, c. 16. The Courts, in several cases referred to in the argument before us and in the Court below, have determined upon an equitable construction of that Act, that if an action be duly commenced

(a) 2 A. & E. 389.

27 L. J., Q. B. 489.

(b) Cowp. 738.

(d) 4 M. & W. 42; in error,

(c) 7 E. & B. 283; in error, 6 M. & W. 351.



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within the time limited by the statute, and afterwards abates without any default of the plaintiff, a second action, commenced within a reasonable time after the abatement, shall be considered as a revival of the first. A similar equitable construction was recognised in the case of *Knight v. Bate* (a).

The question, however, in this case arises in an action on a bond, and is to be determined by the construction to be put upon the 3rd, 4th and 6th sections of the 3 & 4 Wm. 4, c. 42, which limits the time for bringing actions upon bonds or other specialties. The language of this latter statute is the same, *mutatis mutandis*, as that used in the statute of James, and the object seems to have been to add actions upon specialties and some others to those mentioned in that statute. It would therefore seem but reasonable that the same construction should be put upon the provisions of the latter statute as has been put upon the former, so far as such a construction may be applicable. It was said, however, for the defendant in the suit, that the provisions of the 3 & 4 Wm. 4, c. 42, apply to actions for penalties given to the party grieved as well as to actions on specialties, and that to apply the equitable construction contended for by the plaintiff would be contrary to the decision in *Adam v. The Inhabitants of Bristol* (b). It is, however, to be observed that the statute which was in question in that case contained no provisions similar to those in the statutes of 21 Jac. 1, c. 16, and 3 & 4 Wm. 4, c. 42, upon which the equitable constructions in question have been put, and the decision in that case can hardly be considered applicable to this; and it may be questionable whether the same equitable construction which might be extended to actions, which being on contracts differed only in this, that in one case the action was upon a contract by specialty, and in another was upon a simple contract only,

(a) Cowp. 738.

(b) 2 A. & E. 389.



would be applied to actions for penalties given to the parties grieved, whose situation is in some respects wholly different to that of parties to a contract. It is not necessary, however, to consider this, as we think that the same equitable construction which has been applied to cases of actions upon contracts under the statute of James should be applied to actions upon contracts under the 3 & 4 Wm. 4, and that the defendant in error is entitled to our judgment.

Judgment affirmed.

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## IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

THE MARQUIS OF SALISBURY v. GLADSTONE.

June 19.

**E**RROR on a bill of exceptions.—The action was ejectment to recover possession of certain closes of land in the parish of West Derby, and within the manor of West Derby, in the county of Lancaster, and part and parcel of the said manor.

The bill of exceptions stated that the plaintiff proved that he was lord of the manor of West Derby, and had been such lord since 1824; that the defendant was on the 6th of March, 1856, admitted according to the custom to, and then became a copyhold tenant, to hold to him and his heirs at the will of the lord according to the custom of the manor, of a tenement in the said manor being one of the closes mentioned in the writ, he and the other copyhold tenants paying to the lord a fixed annual rent of one shilling, and a fixed fine of four pence on admission, for every customary

A custom in a manor, that the copyholders of inheritance may, without licence from the lord of the manor, break the surface and dig and get clay without limit in, upon and from and out of their copyhold tenements, for the purpose of making bricks to be sold by them off the manor, is good in law.



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acre of 9000 yards in respect of the copyhold tenements severally held by them; that the defendant did on divers days after the 4th of August, 1857, and before the commencement of the action, without the licence and against the will of the plaintiff, break the surface and dig and get clay in and upon, and from and out of his said tenement within and parcel of the manor, for the purpose of making the said clay into bricks to be afterwards sold off the manor, and which were afterwards sold by him off the manor for purposes not connected with the manor; and thereupon the counsel for the plaintiff insisted that the tenement of the defendant was thereby forfeited to the plaintiff, and that the plaintiff was entitled to recover possession thereof. Whereupon the counsel for the defendant produced evidence of an immemorial usage in the manor for the copyholders of inheritance of the said manor, without any licence from the lord of the manor, to break the surface, and dig and get clay without limit in, upon, from, and out of their copyhold tenements, situate in and parcel of the manor, for the purpose of making the clay into bricks to be afterwards sold by them off the manor, and to sell the same off the manor for purposes not connected with the manor; and the counsel for the defendant insisted that such usage, if proved to the satisfaction of the jury to have existed from time immemorial, was sufficient to prove a custom in the manor, for the copyholders of inheritance of the said manor, without any licence from the lord of the manor, to break the surface and dig, and get clay without limit in, upon and out of their copyhold tenements, situate in and parcel of the manor, for the purpose of making the clay into bricks to be afterwards sold by them off the manor, and to sell the same off the manor for purposes not connected with the manor, and that such custom was good in law. Thereupon the Justices directed the jury to find their verdict for the defendant, if they



should be of opinion that such custom was in fact proved by the evidence; whereupon the counsel for the plaintiff interposed and excepted that such custom was not good in law, and the jury found their verdict for the defendant.

The case was argued (a) by

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*Manisty* (with whom were *T. F. Ellis* and *T. Jones*), for the plaintiff.—The custom proved is bad in point of law. A custom to take the soil of the lord without stint or limit, and to carry away and use it for purposes not connected with the manor, is wholly inconsistent with the relative rights of the lord and the tenants. It tends to the destruction of the inheritance, and is therefore unreasonable and void in law. It is not contended that there may not be a limited right to take clay, but this alleged custom is a custom for all the tenants of the whole manor to do so to any extent. [*Williams, J.*—It has always been held to be the law that a custom for taking soil in the land of another is bad, except in the case of copyholders claiming against the lord. In *The Marquis of Anglesey v. Lord Hatherton* (b) a custom to take the coals in copyhold tenements was set up.] There the jury found that no such custom as that set up existed. Though there may be, by custom, a limited right in a copyholder to do acts in the soil of the lord, which but for the peculiar relation of the lord and the copyhold tenant could not exist, but no case is to be found in the books in which a right so large as that now claimed has been established. In *Clayton v. Corby* (c), which was an action of trespass for carrying away clay, the defendant justified, as owner of a brick kiln, and pleaded that all occupiers thereof for thirty years had enjoyed as of right, &c., a right to dig,

(a) June 18. Before *Wightman, J., Williams, J., Willes, J., Byles, J., Blackburn, J., and Keating, J.*  
(b) 10 M. & W. 218.  
(c) 5 Q. B. 415.



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take, and carry away from the close so much clay as was at any time required by them for making bricks at the brick kiln in every year, and at all times of the year. On motion to enter judgment for the plaintiff, notwithstanding a verdict for the defendant on this plea, the Court held that the claim was unreasonable and bad. Lord *Denman*, in delivering the judgment of the Court, said:—"It is observable that, in all cases of a claim of right in alieno solo, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction." He pointed out that the claim there was "an indefinite claim to take *all* the clay out of and from the said close in which, &c., or, in other words, to take from the plaintiff, the owner, the whole close." That was not a case between lord and copyholder or it would have decided the present question. In *The Attorney General v. Mathias (a)*, it was held that a profit à prendre in another's soil cannot be claimed by custom, however ancient, uniform and clear the exercise of that custom may be; and that a right to carry away the soil of another without stint cannot be claimed by prescription, nor by evidence of a lost grant. [*Williams, J.*—A copyholder of inheritance may be entitled to cut the trees on his tenement, though a custom for a copyholder for life to cut trees is bad. That is fatal to the argument as to the taking in alieno solo. A copyholder of inheritance may by custom work mines; if he may take so much of the soil as consists of coal, why may he not take so much as consists of clay?] He must not destroy the surface. [*Williams, J.*—By custom he may quarry in his own customary tenement. How is that right restrained?] If it be suggested that this is not a claim to take in alieno solo, it must be remembered that the freehold is in the lord, subject to the use by the tenants. In *Lovell v. Lovell (b)*,

(a) 4 Kay. &amp; J. 579.

(b) 3 Atk. 11.



Lord *Hardwicke* pointed out that on this ground no precipe could be brought against the tenant of a copyhold. *Mildmay v. Hungerford* (a) is to the same effect. Two interests are always regarded, the proprietary interest of the lord and the possessory interest of the tenant: *Bourne v. Taylor* (b); *Lewis v. Branthwaite* (c). The interest of the lord is not merely nominal. [*Williams, J.*—If a copyhold tenant commits waste, generally speaking the tenement is forfeited, as a particular estate would be; but by custom a copyholder may commit waste: *The Bishop of Winchester v. Knight* (d).] In *The Dean of Ely v. Warren* (e), Lord *Hardwicke* held that copyholders in fenny lands may be entitled to dig up the lord's soil for turf. But peat or turf may be reproduced. [*Wightman, J.*—After the removal of the clay the ordinary vegetable soil may be left. Clay is in the nature of a mineral.] There is a distinction between a right to coal and a right to get coal. If the right claimed had been to get the clay without injuring the surface, that would have been a limit which does not exist here. Though by custom a copyholder may take minerals provided he does not destroy the surface, there is no case which shews that a custom to mine in such a way as to destroy the surface would be good. A Court of equity will not allow tenants for life without impeachment of waste to exercise their privileges in an unreasonable manner, as by cutting trees planted or growing for shelter or ornament: *Obrien v. Obrien* (f), *Strathmore v. Bowes* (g), *Lord Tamworth v. Lord Ferrers* (h). One of the essentials of a good custom is, that it must be reasonable in itself: Broom's Maxims, p. 824, 3rd ed. *Tyson v. Smith* (i), there cited, might appear to militate

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(a) 2 Vern. 243.

(b) 10 East, 189.

(c) 2 B. &amp; Ad. 437.

(d) 1 P. Wms. 406.

(e) 2 Atk. 189; see also *Fois-**ton v. Crachroode*, 4 Rep. 31 b.

(f) Amb. 107.

(g) 2 Bro. C. C. 88.

(h) 6 Ves. 419.

(i) 9 A. &amp; E. 406.



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against the present argument. But, as is pointed out in the judgment of the Court (a), the distinction between that case and others, to which reference had been made in the argument, was, that the custom gave a certain profit to the owner of the soil for the use of the same. The lord cannot take all the timber trees, but must leave sufficient for necessary reparations: *Heydon and Smith's Case* (b). If the lord could not make this claim, neither can the tenant, and the reason is that any custom which goes to the destruction of the right either of the lord or the tenant is bad. A custom for the lord to enclose the wastes without limit has been held bad, because it would be in destruction of the right of the commoners: *Arlett v. Ellis* (c). In *Ashmead v. Ranger* (d), the House of Lords held that the interest of the tenant was subservient to that of the lord. In *Wilson v. Willes* (e), a plea of a custom to take turf from the waste of a manor to make and repair grass plots in the gardens, parcels of the customary tenements was held to be bad, as being indefinite, uncertain and destructive of the common. *The Attorney General v. Gauntlett* (f) and *Valentine v. Penny* (g) are to the same effect. [*Wightman, J.*—That was a claim of right to dig turf in the lord's soil.] In *Broadbent v. Wilks* (h), a custom for the lord and his tenants of collieries to sink pits within the freehold lands for working the same, and to lay the coals, &c., on the lands near to such pits, being customary tenements parcel of the manor, was deemed unreasonable and void.—(*Wilkinson v. Proud* (i) and *Curtis v. Daniel* (k) were also referred to).

(a) See p. 425.

(b) 13 Rep. 67; S. C. Godbolt, 172.

(c) 7 B. & C. 346. 365. 372.

(d) 1 Ld. Raym. 551.

(e) 7 East, 121.

(f) 3 Y. & J. 93.

(g) Noy's Rep. 145.

(h) Willes, 360; S. C. in error,

1 Wils. 63; 2 Stra. 1224.

(i) 11 M. & W. 33.

(k) 10 East, 273. 277.



*Edward James* (with whom was *Mellish* and *Baylis*),  
appeared for the defendant, but was not called on to argue.

*Cur. adv. vult.*

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The judgment of the Court was now delivered by

WIGHTMAN, J.—This case comes before us upon a bill of exceptions; and the question is whether a custom in a manor, that the copyholders of inheritance may, without licence from the lord of the manor, break the surface and dig and get clay without limit in, upon, and from and out of their copyhold tenements, for the purpose of making bricks to be sold by them off the manor, is good in law.

It was contended for the plaintiff that such a custom was bad, as inconsistent with the right of the lord who had an interest in the soil, and that the custom extended to taking away the soil itself, which the copyholder could, even by custom, have no right to do, to the prejudice of the lord's right, who might become entitled to the immediate possession of the copyhold tenement by forfeiture or escheat.

We are however unable to draw any sound distinction between customs for copyholders to take all the timber or trees, or all the minerals in their copyholds, and such a custom to take clay as that in question. I may observe, that it appears to us that the cases of profit à prendre, or easements in the waste of the lord, or in alieno solo, have no application to the present question. The copyholder may by custom not only have a possessory but a proprietary right in the trees and minerals in his copyhold tenement. In the case of minerals, the taking them is in effect a taking of a portion of the corpus of the copyhold tenement. There appears to be no doubt but that a copyholder of inheritance may not only by custom work old mines already opened, but that he may also by custom dig within his



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tenement for new ones, and if successful work them. The case of *The Bishop of Winchester v. Knight* (a) is an authority for the proposition, that by custom a copyholder of inheritance may open and work new mines. Lord Chief Baron *Gilbert*, in his Treatise on Tenures, p. 327, says, that "a copyholder of inheritance cannot without a custom dig for mines," obviously meaning that with a custom he could. In *Scriven on Copyholds*, p. 427, 4th ed., it is said, that by custom a copyholder of inheritance may be entitled to the trees and mines in his copyhold. Mr. *Manisty*, in his argument, did not doubt but that a custom for a copyholder to have and work quarries and mines might be good, but contended that the *surface* must be left; but no case was cited to warrant such a conclusion. It may be, that the mine or mineral, or a quarry of stone, might occupy the whole surface of the particular copyhold tenement, and that a general right to take stone or minerals would necessarily involve the taking of the surface; but, in the present case, there is nothing to shew that the taking the clay would necessarily involve the taking of the surface,—all the clay might be so situate as to be capable of being got at as coals or other minerals. But, however that may be, we think there is nothing to shew that such a custom as that in question is unreasonable or bad in point of law; and we may further observe that it is said in *Scriven on Copyholds*, p. 26, 4th ed., that a custom is not unreasonable because it is prejudicial to or diminishes the lord's casualty, or profits as to escheat. For these reasons we think that the defendant is entitled to our judgment.

Judgment affirmed.

(a) 1 P. Wms. 406.



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## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

WILLIAM COLLINS v. CAVE.

June 18.

**T**HIS was a proceeding in error on the judgment of the Court of Exchequer on demurrer to the declaration. The case is reported, *antè*, vol. 4, p. 225.

*C. E. Pollock*, for the plaintiff.—The declaration states a good cause of action. It alleges a fraudulent representation by the defendant, and damage resulting therefrom to the plaintiff. In Com. Dig., “Action on the case for deceit” (A. 10), it is said that an action lies “if a man, by a false affirmation of a thing within his knowledge, procure a fact to be done which otherwise would not be done.” From the relation between these parties one had a right to expect

A declaration alleged that the plaintiff, defendant and C. had entered into a joint speculation in railway shares: that C. had advanced 6000*l.*; 2000*l.* on his own behalf, 2000*l.* as a loan to the plaintiff, and 2000*l.* on behalf of the defendant: that C. was desirous of retiring from the adventure, and the de-

fendant offered to take upon himself the whole of the adventure and debt of 6000*l.*, provided the plaintiff would consent to abandon his share to the defendant, and C. would accept the defendant as his debtor in the place of the plaintiff for the said sum of 2000*l.*: that the plaintiff did abandon his share of the adventure to the defendant, and the defendant agreed to take upon himself the whole adventure and become debtor to C. for the whole 6000*l.*; and C., on the faith and in the belief that such an arrangement was made, consented to accept the plaintiff as such debtor in the place of the plaintiff; nevertheless the defendant knowing that he alone was capable of proving that the plaintiff had assented to the said arrangement, fraudulently, falsely and maliciously, and before the Evidence Act, 14 & 15 Vict. c. 99, and in order to induce C. to believe that the said joint adventure had never been put an end to, and to induce C. to sue the plaintiff for the 2000*l.*, and to deter the plaintiff from calling the defendant as a witness, and to destroy his credit as a witness if so called, wrote and sent to C. a letter purporting to be addressed to the plaintiff but directed to C., wherein he fraudulently and falsely pretended to expostulate with the plaintiff, and asserted that the plaintiff had positively refused to concur in the said arrangement. By means whereof C. was induced to and did believe that the plaintiff had never agreed to retire from the said adventure, and acting on such behalf C. brought an action against the plaintiff to recover the 2000*l.*: that the said action was referred to an arbitrator upon the terms that neither the plaintiff nor the defendant should be examined; and C. recovered against the plaintiff 2486*l.*, which he was compelled to pay.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the declaration was bad, since it did not appear that the damage to the plaintiff was the natural result of the wrongful act of the defendant.



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good faith from the other. In *Gerhard v. Bates* (a), the Court treated it as clear law that if A. makes a fraudulent representation, which is false, and which he knows to be false, to B., meaning that B. shall act upon it, and B., believing it to be true, does act upon it, and thereby suffers damage, B. may maintain an action against A. for the deceit. It is not necessary that the representation should be made immediately to the other: *Pilmore v. Hood* (b), *Scott v. Dixon* (c), *Seymour v. Bagshaw* (d). In *Bedford v. Bagshaw* (e), *Bramwell*, B., said, it is not a bad rule that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequence may be. [*Wightman*, J.—Had Charles Collins a good cause of action against the now plaintiff?] Not if all the facts were shewn. [*Wightman*, J.—Then the action is in substance for advising Charles Collins to bring an action which was not maintainable. Might not the plaintiff have had a good cause of action if the defendant had been called as a witness, and had spoken the truth?] If a person who has been party to a particular transaction, and knows that he is the only witness, makes a false statement with intent to induce another to bring an action, and to disqualify himself as a witness, he is liable for the consequences. It will be said on the other side, why did not the now plaintiff call the defendant as a witness? [*Blackburn*, J.—It is not suggested on the record that the defendant would have committed perjury. *Williams*, J.—It is consistent with what appears on the record, that he was called as a witness, and that the arbitrator did not believe him, and decided as he did notwithstanding the defendant's evidence.] It does not lie in the mouth of

(a) 2 E. & B. 476. 488.

(b) 5 Bing. N. C. 97.

(c) 29 L. J., N. S. Exch. 62 n.

(d) 18 C. B. 903; see per

*Bramwell*, B., 4 H. & N. 548.

(e) 4 H. & N. 538.



the defendant to say that the plaintiff was not justified in acting on the representation made by him, or that the damage did not flow from his wrongful act. In *Barley v. Walford* (a) it was held to be no answer to an action for deceit that the plaintiff might, by inquiries, have avoided the result which followed from his believing and acting on the fraudulent statement of the defendant. [*Willes, J.*—May not the declaration be good as a count for maintenance? According to *Broughton's Case* (b) terror of suit is a damnification, and in *Pechell v. Watson* (c) stirring up a pauper to bring an action was held to be actionable.] It is not necessary to shew that the plaintiff would have succeeded if he had had the benefit of the defendant's testimony. In an action by a plaintiff against a witness for not obeying a subpoena, where there were several issues, it was held that it was not necessary to shew that the plaintiff had a good cause of action, since his evidence might have affected the costs of some of the issues: *Couling v. Coe* (d). The ground of the decision in *Cotterell v. Jones* (e) was, that it did not appear that any costs had been incurred or awarded in consequence of bringing the action. Here the institution of the suit by Charles Collins, and the inability of the now plaintiff to defend himself, were brought about by the fraudulent representation of the defendant, and it was, therefore, a natural and necessary consequence of the act of the defendant that the award was made in favour of Charles Collins and against the now plaintiff.

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*Montague Smith* and *Flood*, who appeared for the defendant, were not called upon.

WIGHTMAN. J.—We are all of opinion that the judgment

(a) 9 Q. B. 197.

(d) 6 C. B. 703.

(b) 5 Rep. 24.

(e) 11 C. B. 713.

(c) 8 M. &amp; W. 691.



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must be affirmed. The action is grounded on a fraudulent representation which induced a person to bring an action, which he ought not to have brought, from which damage resulted to the plaintiff. The difficulty is, to say that the damage necessarily resulted from the fraudulent representation. It is alleged that the representation was made with a view to induce Charles Collins to bring the action and to deter the now plaintiff from calling the now defendant as a witness, and that his evidence would have been that an agreement had been made which was an answer to the action; but it does not appear on what ground the arbitrator formed his judgment, or that the suggested defence was relied upon before him. It is stated that neither the plaintiff nor the defendant were to be examined before the arbitrator, but it is not said that the facts were not admitted. The arbitrator may have considered that the agreement was not binding. There is no sufficient reason why the now defendant should not have been called as a witness, for it is not to be assumed that he would have spoken falsely upon his oath. We cannot infer that the arbitrator had no ground for coming to the decision at which he arrived; and we do not see that the damage which the plaintiff alleges himself to have sustained arose from the acts of the defendant.

WILLIAMS, J., BYLES, J., BLACKBURN, J., and KEATING, J.,  
concurred.

WILLES, J.—I concur in the judgment which has been delivered, but it must be remembered that the point as to maintenance is left untouched by this decision.

Judgment affirmed.



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## IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

CUTHBERTSON v. IRVING.

July 7.

THIS was a proceeding in error upon the judgment of the Court of Exchequer on a special case, stated by an arbitrator for the opinion of the Court (reported *ante*, vol. 4, p. 742).

An assignee of the reversion may establish his title against the lessee by way of estoppel.

*Udall* argued for the defendant (a).—The questions are, first, whether a reversion by estoppel can be conveyed to an assignee; and, if so, whether the assignee can maintain an action of covenant against the lessee. Secondly, whether in this particular case the lessor has effectually assigned his estate by estoppel. Thirdly, whether the declaration properly states the interest of the lessor. In *Armiger v. Parks*, cited in *Awder v. Noke* (b), it was held that if the first lease

J. B., being mortgagor in possession, on the 22nd of February, 1848, by indenture executed by him and the defendant, demised to the defendant certain premises for seven years, and the defendant covenanted to

repair. On the 2nd February, 1854, J. B. executed an indenture, whereby, after reciting the mortgage and that he had sold the equity of redemption to the plaintiff, he "granted, bargained and sold, aliened, released and surrendered the premises, and all his estate, right and title, both at law and in equity therein, to the plaintiff," &c. The plaintiff sued the defendant for a breach of the covenant to repair. The declaration, after stating the lease and covenant, alleged that J. B. by deed assigned the premises to the plaintiff, whereby the reversion thereof, subject to the term created by the lease, vested in the plaintiff. The defendant pleaded that J. B. did not assign the premises to the plaintiff; nor had he at the time of making the lease any reversion of and in the premises; nor did any reversion in the premises come to the plaintiff:—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the plaintiff was entitled to have the verdict on this plea entered for him: that the defendant was estopped from denying that the lessor had such a legal estate as would warrant the lease; and as no other legal estate or interest was shewn to have been in the lessor, it must be taken as against the lessee, by estoppel, that the lessor had an estate in fee.

(a) June 20. Before *Wightman, J., Williams, J., Willes, J., Byles, J., Blackburn, J., and Keating, J.*

(b) *Moore*, 419; *S. C.*, cited *Cro. Eliz.* 437, nom. *Armiger v. Purcas*.



**SECRET**

the defendant, S. T. claimed the leasehold interest in the property for the term of twenty-two years, and that the plaintiff, J. T., claimed the same for the term of twenty-two years. The defendant alleged that the leasehold interest in the property was assigned to him by the plaintiff, J. T., and that the plaintiff, J. T., was not the legal assignee of the leasehold interest in the property. The plaintiff, J. T., alleged that the leasehold interest in the property was assigned to him by the defendant, S. T., and that the defendant, S. T., was not the legal assignee of the leasehold interest in the property. The Court, on demurrer, held the plea good, and that the leasehold interest in the property was assigned to the plaintiff, J. T., and that the defendant, S. T., was not the legal assignee of the leasehold interest in the property. The Court, on demurrer, held the plea good, and that the leasehold interest in the property was assigned to the plaintiff, J. T., and that the defendant, S. T., was not the legal assignee of the leasehold interest in the property.

(a) On Feb 190, N. C. Moore,  
410  
(b) On February 190 191  
(c) On Feb 190 191

(d) 2 Stra. 817.  
(e) 1 Brod. & B. 531.  
(f) 7 L. J., O. S. K. B. 18.



Court of Common Pleas in Ireland in *Lennon v. Palmer* (a). There *Doherty*, C. J., in delivering the judgment of the Court, said, "It is true that the estoppel will bind the lessee against any one deriving his legal title from the lessor, but it is equally true that the lessee is under no obligation to admit the title of his lessor in any action by any person save that lessor himself, or by any one who is his legal assignee." In *Whitton v. Peacock* (b), on a case sent from Chancery, it appeared that a lessor, having only an equitable estate in a certain field, of copyhold tenure, demised a portion of it to a lessee for ninety-nine years, and afterwards acquired the legal estate by surrender and admittance according to the custom of the manor. By various surrenders and admittances the customary estate of the lessor became vested in the plaintiff. The Court of Common Pleas certified that the plaintiff could not maintain an action of covenant against the assignee of the lessee. In *Gouldsworth v. Knights* (c), *Parke*, B., suggested that the reason of that decision was, that the reversion by estoppel on the first lease was not a copyhold transferable by surrender and admittance. [*Wightman*, J.—I think that the Court meant to decide the case upon the grounds taken in the argument.] In *Gouldsworth v. Knights* (c), the Court intimated an opinion that the plaintiff, being estopped from disputing the title of the old trustees, could not dispute the title of the new trustees who claimed by an assignment from the old trustees; but they did not decide the case on that ground, and there is no earlier authority for the doctrine. In *Pargeter v. Harris* (d), Lord Denman observed this. [*Williams*, J.—In *Pargeter v. Harris* the title of the lessors was shewn on the face of the lease, and the defendants, therefore, were not estopped from shewing that the lessors had not a legal

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(a) 5 Irish Law Rep. 100. 106.

(b) 2 Bing. N. C. 411.

(c) 11 M. &amp; W. 337.

(d) 7 Q. B. 708.



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reversion.] In *Sturgeon v. Wingfield* (a), the defendant had acquired an interest which fed the estoppel and the term which commenced by estoppel had become an estate or interest (b). [Williams, J.—When Lord Wensleydale said that the reversion by estoppel is a reversion in fee, he probably meant that it is *primâ facie* a fee; but probably the lessor may shew that it is a less estate. Were this otherwise there would be a difficulty in cases where a lessee for years, after having mortgaged his estate, grants an underlease. If the reversion upon such underlease must be assumed to be an estate in fee, the heir must bring actions when in fact the beneficial interest would be in the executor.] In *Webb v. Austin* (c), the Court does not overrule *Whitton v. Peacock* (d), except on the point that the estoppel might be fed. The statute 32 Hen. 8, c. 34, does not give a remedy to any one who is not a grantee or assignee of the land. The persons empowered by it are “all persons having any gift or grant of any lands or other hereditaments, or of any reversion in the same, &c., and all persons being grantees or assignees to or by the king or to or by any other person than the king, &c.”—Secondly. The declaration is bad on general demurrer for not setting out the title of the lessor: *Thursby v. Plant* (e). [Williams, J.—Is that a ground of general demurrer?] In *Willet v. Boscomb* (f), the point arose on motion in arrest of judgment; that was in Trin. T. 7 Anne, after the passing of 4 Ann. c. 16. [Williams, J.—If the declaration is insufficient in this respect it may be amended. Wrightman, J.—For the purpose of the present argument we will treat the declaration as if it averred a seisin in fee, which had been traversed by the defendant.]—Thirdly.

(a) 15 M. & W. 224.

(d) 2 Ring. N. C. 411.

(f) See *Webb v. Austin*, 7 Man.

(e) 1 Wms. Saund. 233 a.

& G. 701, 724.

(c) 11 M.C. 179.

(b) 7 Man. & G. 701.



If the lessor had any legal interest by way of estoppel, he has not assigned it, and such estate remains in him. He has assigned the equity of redemption, which is a mere contract. If, after the assignment of the equity of redemption to the plaintiff, the lessor had acquired the legal estate, the estoppel would have been fed. The reversion could only pass by surrender and admittance. Therefore, even if the reversion by estoppel could, under any circumstances, have been assigned, it has not, in fact, been assigned here.—He also referred to *Doe d. Prior v. Ongley* (a).

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*Crompton Hutton* (with whom was *Edward James*), appeared to argue for the plaintiff, but was not called upon.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WIGHTMAN, J.—The lessor in this case, being a mortgagor in possession at the time of the granting of the lease, had no legal title to the premises, but only an equity of redemption. His title, therefore, as between him and his lessee is only by estoppel, and if the lessor assign, as he can only assign that which he had, his assignee will either have a title by estoppel as against the lessee, or no title at all. In this case, if the plaintiff had declared in the old form he would have stated the lessor to have been seised in fee, which according to the cases might have been traversed, and if it had, and it had appeared upon the evidence that the lessor had no legal estate or interest whatever in the premises, but only an equity of redemption, the question is, how ought the issue upon the traverse to be found? The answer is, for the plaintiff, because the lessee is estopped from denying that the plaintiff had such a *legal* estate as would warrant the lease; and as no other legal estate or

(a) 10 C. B. 25.



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interest is shewn to have been in the lessor, it must be taken as against the lessee, by estoppel, that the lessor had an estate in fee. It may be difficult to reconcile all the cases upon the point, but they are all discussed in the notes to *Spencer's Case*, in the 1st volume of Smith's Leading Cases, p. 66, and in the judgment in this case, delivered by my brother *Martin* in the Court below; and the result appears to be, that there is no sound reason why the assignee of the reversion should not establish his title by way of estoppel. We, therefore, think that the judgment should be affirmed.

Judgment affirmed.

### IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

June 19.

RUSSELL v. THORNTON.

The plaintiff,  
who was agent  
in London of  
the foreign

THIS was a proceeding in error on the judgment of the Court of Exchequer for the defendant upon a special case owners of a steam-ship, "B.," being instructed by them to cause the ship to be insured for a year, from the 21st of January, 1857, employed H. and Co., insurance brokers, to effect the insurance. On the 15th of January, H. and Co. applied to the defendant to become an insurer. On that day the plaintiff received a letter from the captain of the ship informing him that the vessel had been aground and had received some heavy blows, and had made her way in a sinking state to the port of Carthagena, where she then was. On the same day the plaintiff communicated this letter to H. and Co., but they did not communicate it to the defendant. On the 16th the defendant agreed to become an insurer for 3000*l.*, and debited H. and Co. with the premiums. On the 22nd the plaintiff sent an extract from the captain's letter to Lloyd's. The defendant, who was then for the first time informed of the fact that the ship had been ashore, wrote to H. and Co. as follows:—"Understanding that the ship 'B.' has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired. This letter was not answered by H. and Co. The debit of H. and Co. in the books of the defendant remained until after the loss. On the 2nd April, the vessel was surveyed and reported to be perfectly tight and in a condition to undertake a voyage of any description. After several intermediate voyages she was totally lost on the 9th of October, 1857.—*Held*, in the Exchequer Chamber: First, that there was no waiver of the objection to the policy by reason of the concealment of the information that the vessel had been ashore. Secondly, that there was no evidence of a new contract founded on the defendant's letter of the 22nd of January.

*Semle*, that the letter, even if answered by H. and Co., would not have amounted to a new contract.



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offer to insure on the terms mentioned. Besides, the defendant retained the premium. There was either a waiver or a new contract. [*Williams, J.*—When do you say the risk ceased under the new contract?] At the end of the original year, the 19th January, 1858. The defendant in effect says, “I will be bound by the original contract from the time the vessel is surveyed and repaired.” It is immaterial whether there was a waiver or a new contract. If a new contract, was it assented to by the plaintiff? There is sufficient evidence of assent. The letter was received by the brokers on the same day, and their silence is equivalent to assent. The defendant having limited the commencement of his liability to the period when the ship should be repaired, it became immaterial to him whether there was a previous concealment; for the only object of the communication is that the person asked to subscribe the policy may himself judge as to the nature of the risk. The fact of the defendant’s letter not having been answered is no proof that it was rejected, whilst an assent to it may be inferred from silence coupled with conduct. [*Crompton, J.*—The letter does not look like a new insurance: it merely says that, under the circumstances, there shall be no risk until the vessel has been repaired; that is, under the old contract.] There can be no doubt that the plaintiff received the proposal and acted upon it; and, moreover, the defendant intended that the plaintiff should act upon it, to his detriment. The defendant, having placed the plaintiff in this position, cannot now be heard to say there was no waiver of the non-communication. It is evident that the plaintiff acted on the faith of the letter, for he took no step to effect any other insurance of the ship. The repairs were done, and after the ship was lost the defendant turns round and says, “although you have abstained from effect-



ing another insurance in consequence of my conduct, I will now repudiate the risk." The plaintiff relies on the principle that, if one person by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time: *Pickard v. Sears* (a). [Crompton, J.—If the parties wished to enter into a new contract of insurance for three quarters of the year, I should have thought that there would have been a demand for the return of a quarter's premium. *Wightman*, J.—My difficulty is this—the plaintiff is silent; he does nothing until the loss occurs and makes it desirable that he should act. His silence may be interpreted thus: "You may consider what you like, but you are bound by the terms of the policy."] The defendant does not demand any answer to his letter. [Keating, J.—It is the brokers who are debited, and the case makes no mention of the state of accounts between them and the plaintiff.] The usual course of business in London amongst insurance brokers is, that the premiums are not paid when the insurance is effected, but the debit is considered by both parties as payment.

*Lush* (with whom were *Bovill* and *C. Pollock*) appeared to argue for the defendant, but was not called upon.

WIGHTMAN, J.—As to the first count, we are all of opinion that there was no waiver of the omission to communicate the information material to the risk, because a person cannot waive that which he does not know; and it was not until after the policy was effected that the defend-

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(a) 6 A. & E. 469.



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ant became aware of the state of the ship. Therefore the whole question arises on the second count: and we are all of opinion that there was no evidence of a new contract. All that appears upon the evidence is this (and we are put in the place of a jury):—On the 22nd January, 1857, the defendant thus wrote to the brokers and agents of the plaintiff—"Understanding that the steamer *Butjadingen* has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." Therefore, even if the brokers had sent an instant answer, saying "We think so ourselves," it is doubtful whether that would have amounted to a new contract. But no answer whatever is sent. The only evidence as to a change of contract is that the defendant uses those expressions in a letter and the brokers say nothing. There is no evidence of any acceptance of those terms, even supposing they would amount to a new contract, and consequently there is no evidence to warrant a verdict for the plaintiff on the second count. For these reasons we think that the judgment of the Court below ought to be affirmed.

Judgment affirmed.

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# Exchequer Reports.

MICHAELMAS TERM, 24 VICT.

CHAPPELL v. BRAY.

1860.

Nov. 3.

**ACTION** for money paid by the plaintiff for the use of the defendant.—Plea: Never indebted.

At the trial, before *Bramwell*, B., at the Cornwall Summer Assizes, 1859, it appeared that the action was brought to recover from the defendant contribution in respect of two sums of 200*l.* and 110*l.* 16*s.* 9*d.* paid by the plaintiff as ship's husband in repairs and alterations of a ship, of which the plaintiff and defendant were part owners. There was no evidence of any formal appointment of the plaintiff as ship's husband, but it was proved that he had acted in that capacity. On the 22nd of January, 1860, there was a meeting of the owners of the ship, at which the plaintiff and defendant were present, when it was proposed to cut

The plaintiff, part owner of a ship, and who acted as ship's husband, being authorized by the other part owners (of whom the defendant was one), to repair and lengthen the ship, gave verbal orders for the repairs, and entered into a written contract with a ship builder for lengthening the ship. Afterwards the plaintiff received a notice

from the defendant that he would not be answerable for any alterations in the ship. The work was completed and the plaintiff paid for it, and on telling the defendant the amount, he said that "the ship had better have been sold." The plaintiff having sued the defendant for his proportion of the money paid:

*Held*:—First, that the fact of the plaintiff having acted as ship's husband was sufficient evidence of his appointment, without any formal proof.

Secondly, that the authority to make the alterations could not be revoked after it was acted on, and that it was for the defendant to prove that his notice was given before the work was commenced.

Thirdly, that the plaintiff need not produce the written contract, since the work was done, the money paid under it, and the defendant, on being told the amount, did not deny his liability.



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the ship in two and lengthen as well as repair her. The defendant at first said he would rather have the vessel sold, but afterwards he said "he would not stand alone," and the proposal was carried. The plaintiff afterwards gave verbal orders for repairs, and also entered into a contract in writing with a shipbuilder, and the ship was taken into dock and the works commenced. This contract was not produced in evidence, it being unstamped. On the 26th of January the defendant served the plaintiff with the following notice:—"To Mr. Chappell, part owner of the ship, &c., and all whom it may concern. I, William Bray, do hereby give notice that I will not be answerable for any alterations that may be effected in the ship, or any debts which may be contracted on the said vessel from and after the date of this action." The work was completed and paid for by the plaintiff. Afterwards the plaintiff told the defendant of the amount which he had paid, when the defendant said, "You had better have sold her."

It was objected on the part of the defendant: First, that there was no evidence of any authority to the plaintiff to order the repairs and alterations: Secondly, that the work was done after notice from the defendant that he would not be liable: Thirdly, that the written contract ought to have been given in evidence. The learned Judge reserved the points, and a verdict was entered for the plaintiff with 25*l.* damages; the defendant to be at liberty to move to enter a nonsuit, and the Court to have power to deal with the facts.

*Coleridge*, in the following Term, obtained a rule nisi accordingly, against which

*H. T. Cole* shewed cause.—The defendant would have been liable for work that was necessary, although he was not present when it was ordered, and had not assented to



its being done. The law is thus stated in Abbott on Shipping, p. 105, 8th ed.: "With regard to the repairs of a ship and other necessities for the employment of it, one part owner may, by ordering these things on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against." It is sufficient if the necessities are furnished to the ship by order of the ship's husband, being himself a part owner: *Helme v. Smith* (a), *Whitwell v. Perrin* (b). Then could the plaintiff bind the defendant in respect of the work not necessary? A special authority was given to him as ship's husband, in pursuance of which he entered into a contract with a shipbuilder and rendered himself liable for the work done under it. The defendant relies on his notice that he would not be answerable for any alterations to the ship; but he was not at liberty to revoke his authority after the work was commenced and the plaintiff became liable to the shipbuilder. Then, with respect to the written contract, it was not necessary to give it in evidence in order to shew the amount of contribution for which the defendant was liable; it was enough for the plaintiff to prove that the work was done and the price of it paid by him. The defendant relies on *Vincent v. Cole* (c); but *Reid v. Batte* (d) shews that it is not in all cases imperative on the plaintiff to produce the written contract under which work is done. Lord *Tenterden* there said, "So much injustice has frequently been done by a rigid adherence to this rule, that I should be reluctant to carry it into strict execution."

*Coleridge*, in support of the rule.—There was no evidence that the plaintiff was ship's husband. Although the appointment need not be in writing, there must be some

(a) 7 Bing. 709.

(b) 4 C. B. N. S. 412.

(c) 3 C. &amp; P. 481; Moo. &amp; M. 257.

(d) Moo. &amp; M. 413.



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formal act of appointment. [*Wilde, B.*—If a person acts as ship's husband without any appointment, and the owners of the ship acquiesce in it, that is enough.] A ship's husband has no authority to pledge the credit of the owners for lengthening the ship, but only for necessary repairs. Moreover, before the greater portion of the work was done, the authority from the defendant was revoked by his notice. The contract ought to have been given in evidence; the defendant was entitled to know what portion of the work was done under it. Besides, it was material for the plaintiff to prove that the work was commenced before the defendant revoked his authority, and that would appear by the date of the contract. If the shipbuilder had sued the plaintiff for the work, the former must have produced the contract, and this action equally depends upon it. The defendant is not liable for the money paid by the plaintiff unless it was the plaintiff's duty to pay it, and that can only be ascertained from the contract. [*Channell, B.*—The liability of the defendant depends on the facts that the plaintiff has exercised the authority to order the work, and has paid for it.] Suppose the plaintiff paid more than the contract price, the defendant would not be liable for the excess: that shews that the contract ought to be produced, in order that the defendant may see that he is not charged with more than the plaintiff was bound to pay. *Buxton v. Cornish* (a) and *Vincent v. Cole* (b) are authorities in point.

*POLLOCK, C. B.*—We are all of opinion that the rule ought to be discharged. The first objection is, that the plaintiff had no authority to order the repairs and alterations of the ship. It appears to me that the conduct of the defendant at the meeting of the owners, when he said that

(a) 12 M. & W. 426.

(b) 3 C. & P. 481; Moo. & M. 257.



"he would not stand alone," amounted to an agreement to join the others in giving the order, and therefore he cannot now say that the plaintiff had no authority. In considering the whole case, we ought to bear in mind what was pointed out by my brother *Bramwell*, that the plaintiff was not merely an agent but a part owner of the ship. The second objection is, that the work was done after notice by the defendant that he could no longer be liable. It may be conceded that an owner of a vessel has a right to say to the other owners that he will not expend money in repairing her, and that if they choose to order repairs it must be on their own responsibility. But here the defendant had authorized the work, and it was for him to shew that the notice was given before the work was commenced. The third objection is, that the contract ought to have been given in evidence. I am not prepared to decide whether it ought or ought not, for on the present occasion it is unnecessary, because when the work was done and the defendant was told the amount he made no complaint that the sum with which he was charged was not strictly correct, nor did he make any inquiry about it, but merely said that it would have been better to have sold the vessel. His conduct is evidence from which a jury might come to the conclusion that the claim was correct, and it is now too late for him to dispute it. For these reasons it appears to me that all the grounds of the rule fail.

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BRAMWELL, B.—I am of the same opinion. The plaintiff seeks to recover from the defendant a proportion of two sums of 200*l.* and 110*l.* 16*s.* 9*d.*, paid by the plaintiff, as ship's husband, for the repairs and alterations of a ship of which the defendant was a part owner; and the question is, whether the plaintiff has made out his case in respect of either or both of those sums. Now there is no doubt



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the defendant did agree that the vessel should be lengthened, and that, in point of fact, it was lengthened under a written contract. It was argued, on the part of the defendant, that his obligation was to pay a proportion of that money for which he was liable under the contract, and since the contract was in writing it must be produced. But *Slatterie v. Pooley* (a) established that the necessity of proving a written agreement may be superseded by an admission of the defendant. Then the question is, whether there was any evidence of such an admission. The plaintiff says to the defendant, "I have paid 200*l.* for alterations of the ship," and the defendant does not deny his liability to pay his share of it. In my opinion it cannot be said that the defendant's conduct and demeanour is not an admission by him that the money has been paid. If the defendant relies on a revocation of his authority before the agreement was acted on, he was bound to prove it. It was argued that the plaintiff could not recover for the extras if he could not recover for the work done under the contract; but as he is entitled to recover that work the argument altogether fails.

CHANNELL, B.—In the course of the argument I entertained some doubt, but I am now satisfied that the rule ought to be discharged. The plaintiff, part owner of a ship and also ship's husband, seeks to recover from the defendant, another part owner, a sum which, it is alleged, he is liable to pay, as his proportion of the repairs and alterations of the ship. No question of fact was left to the jury; and, so far as it is necessary for us to discharge the functions of a jury, the parties have given us the power. The first objection is, that there was no proof that the plaintiff was ship's husband, but there was abundant evidence of his having acted in that capacity, and that is sufficient. Then the question arises, what is the position of

(a) 6 M. & W. 664.



a ship's husband? And what authority has he to bind the owners in respect of the ship? It is not necessary to determine whether he has authority to lengthen the ship, because in this case, when it was proposed to do so there was a special authority, which would supply the place of any want of authority which the law might imply. Therefore, the ship was lengthened by order of the plaintiff, acting under a special authority. Then it is said that the order was given by a written agreement, which ought to have been produced. No doubt its production would have been one mode, and the most convenient mode, of proving the plaintiff's claim; but I am not prepared to admit that it is the only mode. It was objected that no question as to the written agreement could be asked without producing it; but I think the agreement was not a necessary element in the plaintiff's case, for there was proof that the work was done under it, the amount paid, and that it was not unreasonable; and there were circumstances from which the Court, sitting as a jury, might infer that the defendant adopted the payment. Then, did the defendant so act as to warrant the Court in drawing that inference? He was part owner of the ship, and the work was done while the ship was in dock; and taking the notice that he would be no longer answerable, to have been given on the 26th January, the defendant does not deny that he authorized what was done, nor does he contend that any work was done beyond what he ordered. Moreover, the expression of the defendant when he was told the amount, "that the ship had better have been sold," is evidence to shew that work was done which he had authorized. The only remaining question is as to the revocation of the plaintiff's authority. The agreement was not put in, and there was no evidence of the date; but the plaintiff having made out a *prima facie* case, it was for the defendant to rebut it by setting up

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the agreement. The defendant merely put in the notice ; but it is evident that the notice was given after some of the work had been done.

WILDE, B.—I am of the same opinion. The question of fact for the Court to determine is, whether there was any agreement on the part of the defendant that the vessel should be lengthened. There is no doubt the plaintiff made out a *primâ facie* case. It appeared that the work was done and had been paid for, and when the plaintiff told the defendant what it cost he did not make any objection, but merely said, “the vessel had better have been sold.” If the question had arisen, whether independently of that conversation it was necessary to put in the written agreement, I should not be prepared to hold that the plaintiff was bound to do so, seeing that there was evidence of an authority to enter into the agreement, and that it was executed. Upon that, however, it is not necessary to give an opinion, for the point does not arise. Then, the plaintiff having made out a *primâ facie* case, the remaining question is, whether there is evidence that his authority was revoked. The proof of that ought to have come from the defendant. An authority cannot be revoked if it has passed an interest and has been executed. Here it had been executed ; for the work was commenced, and consequently there was no power of revocation.

Rule discharged.

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## WOODALL v. VOIGT and Another.

Nov. 15.

**T**HIS was a rule calling on the plaintiff to shew cause why the defendants should not be allowed their costs of this action, pursuant to the 86th section of the Bankrupt Law Consolidation Act, 1849.

The 86th section of the Bankrupt Law Consolidation Act (which entitles a defendant to costs where the plaintiff fails to recover the amount for which he has filed an affidavit of debt), does not apply to cases where the action has been removed by the defendant from an inferior Court.

The plaintiff had filed in the Court of Bankruptcy at Leeds an affidavit of debt, under the 78th section, in which he deposed that the defendants were indebted to him in the sum of 168*l.* 6*s.* 11*d.* for goods sold and delivered. The plaintiff afterwards brought an action against the defendants for that amount in the Court of Record of Kingston-upon-Hull. The defendants removed the cause by certiorari into this Court, and the plaintiff recovered 132*l.* 11*s.* 2*d.* only.

*Digby Seymour* shewed cause.—This case is not within the 86th section of the Bankrupt Law Consolidation Act, 1849. That section provides “that in every action &c. wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the Court in which such action shall have been brought, provided that it shall be made appear to the satisfaction of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt as aforesaid, and provided such Court shall



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thereupon, by rule or order, direct that such costs shall be allowed to the defendant," &c. The 43 Geo. 3, c. 46, s. 3, was in similar terms, and the words "in which such action is brought" were construed to mean "in which such action is originally commenced:" *Connel v. Watson (a)*, *James v. Dawson (b)*, *Costello v. Corlett (c)*. There is no reason why the 86th section of the Bankrupt Law Consolidation Act, 1849, should not receive the same construction. It is no hardship on the defendant, for he removed the cause from the original Court.

*P. Thompson*, in support of the rule.—There has been no decision on the present Bankrupt Act. In *James v. Dawson (b)* the Court doubted whether the proper construction had been put on the 43 Geo. 3, c. 46, s. 3, but felt bound by the authorities. [*Pollock*, C. B.—This is not a remedial but a penal enactment: it says that the defendant's costs shall be paid by the plaintiff if he shall not recover the *full amount* of the sum for which he has filed an affidavit of debt, thereby imposing the same penalty whether the deficiency is 10*l.* or 300*l.* or any other sum. To extend the construction of such an enactment may in many instances be productive of injustice, since the penalty is not commensurate with the offence.]

Per CURIAM (*d*).—The rule must be discharged.

Rule discharged.

- (a) 2 Dowl. P. C. 139.
- (b) 1 Dowl. P. C. 341.
- (c) 4 Bing. 474.

- (d) *Pollock*, C. B., *Bramwell*,  
*B.*, *Channell*, B., and *Wilde*, B.



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WHEELER and Wife v. STEVENSON and HAGGER.

Nov. 25.

**EJECTMENT** to recover possession of two dwelling-houses, Nos. 13 and 14, Portsmouth Street, in the parish of St. Giles in the Fields. The defendant Stevenson did not appear to the writ, and judgment was signed against him. The defendant Hagger defended for the whole of the premises.

The cause was tried before *Channell, B.*, at the Middlesex Sittings in last Easter Term, when it was agreed that a verdict should be entered for the plaintiffs, with liberty to the defendants to move to enter a nonsuit or verdict for the defendants, if the Court should be of opinion that there was no evidence that there was no sufficient distress on the demised premises, or of a sufficient search.

*West* shewed cause in last Trinity Vacation (June 20); but, at the commencement of his argument, the Court called on *G. Browne* to support the rule. The facts of the case, and the points, are so fully stated in the judgment

In ejectment for a forfeiture, under the Common Law Procedure Act, 1852, s. 210, it appeared that the plaintiff sought to recover possession of two houses, numbered 13 and 14, which, in August, 1849, with two other houses, numbered 15 and 16, were demised by the plaintiff to L. for twenty-one years at an annual rent of 73*l.* 10*s.* payable quarterly. The lease contained the usual proviso for re-entry on nonpayment

of rent. At Midsummer 1858, a year's rent was due, and in July, 1858, the houses, No. 15 and 16, were deserted and a police constable entered and for some time kept possession of them, but afterwards, by the direction of the plaintiff's agent, gave possession to T. to take care of them for the plaintiff; but upon a verbal understanding that if the plaintiff could get possession of No. 13 and 14, the four houses should be let to T. In December, 1859, a distress for 73*l.*, one year's rent, due Michaelmas 1858, was put in on No. 13 and 14, which were then occupied by the defendants. At that time the property on the premises was only worth a few shillings, and there never was, up to the commencement of the action, a sufficient distress to satisfy the arrears of rent. No distress or search was made on No. 15 and 16 after T. took possession, and it was uncertain whether, at the time of the service of the declaration, there were or were not goods on those premises sufficient in value, if distrainable, to satisfy the arrears of rent.

*Held.*—First, that there was no evidence for the jury of an eviction by the plaintiff in respect of the houses No. 15 and 16.

Secondly, that there was evidence of no sufficient distress, since the plaintiff was not bound to shew that there were no goods of sufficient value in No. 15 and 16, inasmuch as the possession of T. must be considered as the plaintiff's possession and, under the circumstances, justifiable.



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that any further report of them is rendered unnecessary.  
*Doe, Lessee of Smelt, v. Fuchau (a)* was referred to.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action of ejectment, tried before my brother *Channell*, at the Sittings in last Easter Term. It was brought to recover possession of premises Nos. 13 and 14, Portsmouth Street, St. Giles in the Fields.

Judgment for non-appearance was signed against the defendant Stevenson. The defendant Hagger defended for both houses.

The premises sought to be recovered were, with two other houses numbered 15 and 16 in the same street, by lease dated the 27th August, 1849, demised by the plaintiff Wheeler to one Leary for a term of twenty-one years, at an annual rent of 73*l.* 10*s.*, payable quarterly. The lease contained a proviso, which was in the ordinary form, for re-entry on non-payment of rent. The action was brought under the Common Law Procedure Act, 1852, s. 210, for a forfeiture, by non-payment of half a year's rent.

The plaintiffs proved a clear title to recover, provided a forfeiture was established, and insufficiency of distress shewn. Rent was received under the lease up to Midsummer, 1857, leaving at Midsummer, 1858, a year's rent due. It was proved that in July, 1858, the houses numbered 15 and 16 were unoccupied and deserted. Nothing whatever available for the rent was left upon them. A police constable entered upon them and kept possession for some time. He did so to prevent any nuisance which might arise by reason of their unoccupied and deserted state. He afterwards, by

(a) 15 East, 286.



the direction of Francis Wigg, acting as the agent and by the authority of the plaintiff Wheeler, gave possession of these two houses to one Tempany. Tempany was let into possession in order to take care of them for the plaintiff, Wheeler; but upon a verbal understanding that if, and when, the plaintiff could get possession of the premises 13 and 14, the four houses would be let to him. Tempany had no interest in the premises, save such as might arise under this verbal agreement.

In December, 1859, a distress for 73*l.*, for one year's rent, due Midsummer, 1858, was put in upon the premises numbered 13 and 14. They were then respectively occupied by the defendants Stevenson and Hagger—Hagger occupying No. 14. The property on those premises at that time was worth but a few shillings—wholly insufficient to meet the arrears of rent reserved under the lease.

On the 5th of January, 1860, a notice was affixed on the door of the premises No. 14, demanding possession of 13 and 14. The doors of those houses were then closed, and kept closed, so that no distress could be made thereon. There was not, at any time between the time of the distress in December, 1859, and the commencement of the present action, any sufficient distress on the premises to countervail the arrears of rent reserved by the lease. Tempany, after the time he was let into possession of Nos. 15 and 16, as before stated, permitted another person to occupy one of such two houses, viz. No. 15. No distress or search was, at any time after Tempany took possession, made on the premises Nos. 15 and 16; and it was left at the trial uncertain whether, at the time of the service of the declaration, there were or were not goods on those premises sufficient in value, if distrainable, to meet the arrears of rent reserved by the lease.

It was objected, on the part of the defendant Hagger,

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that there had been an eviction by the plaintiff, Wheeler, in respect of the premises 15 and 16; that, by reason thereof, the rent reserved by the lease ought to be apportioned; that the condition or proviso in the lease for re-entry was entire and gone by the act of the lessor; and that without a right to re-enter under the lease there was no remedy under the statute.

It was further objected that, if the right of re-entry remained, yet, to entitle the plaintiffs to recover under the statute, they must shew an insufficiency of distress with reference to every part of the premises included in the demise out of which the rent issued, and that, as to 15 and 16, no such evidence was given. There was no dispute at the trial as to the facts; no evidence was offered on the part of the defendant; and it was agreed that a verdict should be entered for the plaintiffs, with liberty to the defendant to move to set the verdict aside, and to enter a nonsuit or verdict for the defendant, provided the Court should be of opinion there was no evidence that ought to be left to the jury in support of the plaintiffs' right to recover. It was further agreed that there should be no appeal.

A rule to shew cause was accordingly obtained. This rule came on to be argued before us (a) in last Trinity Vacation. The Court took time to consider its judgment.

It appears to us unnecessary to give any opinion on the point, what would have been the effect on the condition for re-entry reserved by the lease, with reference to a right to recover under the statute, if a clear and undoubted eviction by Wheeler had been proved. We think there was no evidence on which the jury ought to have found, certainly none on which they were bound to find, the fact of an eviction. The authorities upon this subject are collected in the notes

(a) *Pollock*, C. B., *Channell*, R., was present only a part of the time.  
and *Wilde*, B. *Brumwell*, R.,



to the case of *Salmon v. Smith* (a). But, assuming their view to be correct, it was then argued that the plaintiffs ought to have shewn that there was not, on any part of the premises demised, including 15 and 16 as well as 13 and 14, any sufficient distress to countervail the arrears of rent. We think the present case must be considered as if the premises 15 and 16, having been wholly deserted by the lessee and all parties claiming under him, Wheeler, the landlord (being in no default himself), had put Tempany into possession, but only for security of the premises; that Tempany's possession must be considered as the possession of Wheeler, justified under the circumstances, and that upon the goods of Tempany, Wheeler would not, having regard to these facts, have had any right to distrain for the arrears of rent due under the lease. We think, also, that this view equally applies to the goods of any person whom Tempany may have let into temporary possession under himself.

It is enough, however, to state that, whatever may be the weight due to the objections made by the defendants, there was yet some evidence to go to the jury of an insufficiency of distress on the premises: if so, by the agreement of the parties, the rule ought to be discharged.

The rule will therefore be discharged.

Rule discharged.

(a) 1 Wms. Saund. 204, note (2).

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The plaintiff went to the defendant's residence, which was beyond the jurisdiction of a particular County Court, and there verbally agreed to purchase of him a horse for 28*l*., to be delivered on the following day at the plaintiff's residence which was within the jurisdiction of that County Court. On that day the defendant brought the horse to the plaintiff's residence, when he required a warranty which was given and the price paid. The plaintiff afterwards sued the defendant in the County Court for a breach of the warranty:—*Held*, that there was no complete contract until the warranty was given, and consequently the "whole cause of action" arose within the jurisdiction of the County Court.

In the Matter of a Plaint in the County Court of Northamptonshire, holden at Towcester, wherein J. ARIS is Plaintiff and J. ORCHARD Defendant.

*GRIFFITS*, on behalf of the defendant, had obtained a rule calling on the judge of the County Court of Northamptonshire, holden at Towcester, and the plaintiff, to shew cause why a writ of prohibition should not issue to prohibit the said County Court from further proceeding in the plaint.

It appeared from the affidavits, that the defendant resided and carried on his business at Biddlesden, which is within the district of the County Court of Northampton, holden at Brackley; and that, on the 14th of August, 1860, the plaintiff called at the defendant's residence and verbally agreed to purchase of him a mare for 28*l*.. The mare was to be delivered on the following day at the plaintiff's residence at Leis Weedon, which is within the jurisdiction of the Towcester County Court. Accordingly, on the 15th of August, the defendant brought the mare to the plaintiff's residence at Leis Weedon, when the plaintiff required a warranty of soundness. The defendant gave the warranty, and thereupon the plaintiff paid him the 28*l*.. The plaintiff afterwards entered a plaint in the Towcester County Court for a breach of the warranty. At the trial of the plaint, it was objected on the part of the defendant that the Court had no jurisdiction, as the whole cause of action did not arise within the Towcester County Court. The judge overruled



the objection, on the ground that there was no binding contract out of the district, inasmuch as there was no agreement in writing or part payment of the price; and a verdict was found for the plaintiff for 12*l.* 8*s.* 6*d.*

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*C. Pollock* shewed cause.—By the 9 & 10 Vict. c. 95, s. 60, a County Court summons may issue in any district “in which the cause of action arose.” No doubt that means “the *whole* cause of action;” and the defendant contends that in this case the whole cause of action did not arise within the jurisdiction, because the contract for the purchase of the horse was not made within it. But there was no binding contract until the horse was delivered and the warranty given. [*Martin*, B.—There cannot be two contracts: if there was a complete contract at common law, the Statute of Frauds does not make a new contract because its requisites are afterwards satisfied. The words of the 17th section are that no contract for the sale of any goods, &c., “shall be allowed to be good.” *Pollock*, C. B.—A “cause of action” must arise out of a contract upon which an action can be brought.] On the 14th of August there was a mere preliminary bargain, and if nothing more had taken place the defendant could not have compelled the plaintiff to accept the horse. On the 15th the bargain was completed. The cause of action was the breach of the warranty, which was given within the jurisdiction. *Blossome v. Williams* (a) is an authority that there was no complete contract until the horse was delivered and the warranty given. *Borthwick v. Walton* (b) will be relied on by the defendant; but that case is at variance with *Newcombe v. De Roos* (c), where the defendant, by letter written and posted out of the district of a particular County Court, ordered the

(a) 3 B. &amp; C. 232.

(b) 15 C. B. 501.

(c) 29 L. J., Q. B. 4.



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plaintiff to do certain work: the letter was received and the work done within the district; and it was held that the whole cause of action arose within the district.

*Griffiths*, in support of the rule.—On the 14th of August there was a contract binding at common law; and the price was paid and the warranty given in pursuance of that contract. [*Channell*, B.—If there was a sale before the warranty, the consideration, being executed, would not support it: *Roscorla v. Thomas* (a).] If any part of the cause of action arose in the district where the defendant dwelt, the County Court has no jurisdiction. In an action against an administrator, the grant of letters of administration are part of the cause of action: *In re Fuller* (b). Here a combination of various matters constitutes the cause of action, viz., the bargain for the sale of the horse, the delivery, the acceptance, the payment of the price and the warranty. [*Wilde*, B.—Was it necessary for the plaintiff to give any evidence of what took place on the 14th?] *Borthwick v. Wulton* (c) decided that upon a sale of goods the order for the goods is part of the cause of action. [*Pollock*, C. B.—There the goods were sent in consequence of the order, so that the order and delivery constituted the cause of action.] The warranty given on the 15th was annexed to and became part of the contract made on the 14th. [*Pollock*, C. B.—The cause of action was not complete until the 15th. *Wilde*, B.—It may be that several events are necessary to entitle a party to sue, but it is not until the last has happened that there is “a cause of action.”] Where a reward was offered for the apprehension and prosecution of certain offenders, such reward to be paid on conviction, and the plaintiff apprehended an offender within the district of a certain County

(a) 3 Q. B. 234.

(b) 2 E. & B. 573.

(c) 15 C. B. 501.



Court, but the conviction took place in another district, it was held that the conviction was part of the cause of action, and that the County Court had no jurisdiction: *Hernaman v. Smith* (a). Here, the terms on which the contract was made are part of the cause of action.—He also relied on an affidavit that some representation as to the soundness of the horse was made on the 14th of August.

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POLLOCK, C. B.—We are all of opinion that the rule should be discharged. It is said that some representation was made on the 14th of August, but we must decide on the facts proved before the County Court judge. On the 14th of August there was a bargain between the plaintiff and the defendant for the purchase of the horse, and the price was named, and the time and place of delivery; but nothing was said about a warranty. On the following day a warranty was given, the price was paid and the horse delivered, and the whole cause of action became complete. It cannot be contended that the contract took place on two different days. It seems to me that where there is a contract for the sale and delivery of a horse, the price and every other matter being agreed on except the warranty, and when the parties come to complete the purchase the one refuses to pay unless a warranty is given, whereupon the other gives the warranty, then for the first time the transaction is complete. Here, upon the 14th, there was an agreement to buy the horse, and upon the 15th that was rescinded and a new contract made for the purchase with a warranty. The addition of a new term to a contract does not make it two contracts, but one entire contract. Lord *Wensleydale* frequently pointed out, with respect to the affirmance of a contract incapable of being enforced, that it is not so much an affirmance of the old

(a) 10 Exch. 659.



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contract as the making a new one. It seems to me that what took place on the 14th was a mere bargaining for the horse, and that the contract upon which the plaintiff was suing was the contract made on the occasion when the horse was delivered and the warranty given. The question put by my brother *Wilde* illustrates this: Was it necessary for the purpose of the plaint that the plaintiff should give evidence of anything which took place on the 14th? In my opinion, it would have been sufficient to prove that the cause of action arose on the 15th, when the warranty was given. If a contract is imperfect, from not being in writing, or for want of part payment, or delivery, it is no contract until those matters exist which render it perfect, and the cause of action is the contract rendered perfect. Suppose two persons are travelling together, and one verbally agrees to purchase of the other his watch for a price then named, and nothing further is said, or done until they come to London, when the agreement is reduced into writing: in that case the contract and whole cause of action would be in London. For these reasons I think that the rule ought to be discharged.

[illegible]



there was no contract on the 14th, and the purchaser might have refused to receive the horse. Then on the 15th the parties met, and the purchaser required a warranty, which was given, and the price was paid. It seems to me that was a renunciation of any terms agreed upon on the 14th, and that the whole cause of action arose upon the 15th, and within the jurisdiction.

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WILDE, B.—I am also of opinion that the rule should be discharged. The term “whole cause of action” has received a judicial interpretation. All those matters which are necessary to enable a plaintiff to sue constitute part of the cause of action. Then, was it essential for the plaintiff to prove what took place on the 14th? I do not think that any part of the cause of action arose on the 14th. To hold that it did would be carrying the matter further, by way of the division of a contract, than any case has yet gone. A cause of action must be something entire and indivisible, and I am satisfied that in this case the whole contract was made on the 15th.

Rule discharged.

LEGH v. LILLIE.

Nov. 9.

**DECLARATION.**—That the plaintiff, by deed, let to the defendant “The Marl Fields Farm,” to hold for twenty-one years, from the 25th day of March, 1851, and the defendant covenanted with the plaintiff that he would at all

Declaration, that the defendant covenanted with the plaintiff not to sell or carry away from the

demised premises any manure, made &c. on the premises, without the consent of the plaintiff, under the increased rent of 10*l.* for every ton so given, sold or carried away; and further covenanted that he would pay all the increased rents. Breach: that defendant sold a large quantity of manure made on the premises, to wit 160 tons, and did allow the same to be carried away from the premises; and the plaintiff claims 2000*l.* Plea: that the defendant brought upon the premises a quantity of manure larger and better in quality than that carried away.—*Held*, first, that the plea was bad; secondly, that the declaration was bad for not alleging that the increased rent was due or that it was unpaid.



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times, during the continuance of the said term, have and keep a sufficient stock of cattle &c., and that he would not sell or carry away from the demised premises any hay, straw, clover, or fodder, or any dung, compost, or manure, which should be grown or produced, made, gathered or gotten on the demised premises, without the consent in writing of the plaintiff first had and obtained, under the increased rent of 10*l.* for every ton so given, sold, or carried away, and so in proportion for any greater or less quantity, but that the defendant would eat and consume, or cause to be eaten and consumed, the hay and straw, fodder and clover, by his own cattle, on the demised premises; and the plaintiff covenanted with the defendant that the above restriction should not apply in the case of hay and straw, provided that the defendant should, for every ton thereof which he should take from the premises, bring thereon, in lieu thereof, two tons of good rotten dung; and the defendant further covenanted with the plaintiff that he would duly pay all the increased rents, whereof mention was made in the deed. Yet the defendant, without the consent of the plaintiff, &c., did, on the 23rd of March, 1858, sell hay and straw, grown and produced on the demised premises, to wit, six stacks of hay, containing thirty tons of hay, and ten tons of straw, and allowed the same to be carried away from the demised premises and did not in lieu thereof, bring back, upon the demised premises, two tons of good rotten dung for every ton of hay and straw so given, sold, and carried away; and did, without such consent as aforesaid, on the day and year aforesaid, sell a large quantity of farm yard manure, made and gathered and gotten on the premises, to wit, 160 tons of manure, and did allow the same to be carried away from the said premises. And the plaintiff claims 2000*l.*

The defendant pleaded; fifthly, as to so much of the declaration as relates to the sale and removal from the demised



premises of the manure made, gathered and gotten on the premises, that the defendant did, in place of the said manure, and by way of substitution thereof, bring on, to, and upon, and spread upon the said premises a certain other quantity of manure, larger and better in quality than that sold and carried away by him as in the declaration mentioned.

The plaintiff took issue on the plea.

At the trial before the Recorder of London, at the Spring Assizes at Chester, the jury found a verdict for the defendant on the fifth plea.

*Welsby*, in Easter Term, obtained a rule nisi to enter judgment for the plaintiff on the issue on the fifth plea, notwithstanding the verdict found for the defendant; against which

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*Grove* and *Brandt* now shewed cause.—First, the plea is an answer to the breach to which it is pleaded. The meaning of the covenant, not “to sell or carry away” any manure, is that the defendant shall not remove it so as to deprive the land of the benefit of it. A mere temporary removal of manure is not a breach of the covenant. But, secondly, the declaration is bad. It does not shew that the increased rent has become due. It is also consistent with the allegations contained in it, that the increased rent has been paid. [*Channel*, B.—If the meaning of the covenant is that the defendant shall not take away the manure unless he pays the penal rent, the breach is bad for not averring non-payment of such rent.] In an *Anonymous Case* (a), which was an action on a promise to redeliver some rings to the plaintiff, or else pay him 18*l.* in money, the plaintiff averred that the defendant had not redelivered to him the rings, but omitted to say “nor paid him the 18*l.* in money.” And this was held to be naught, though after verdict on not guilty found for the plaintiff, because it may well be that the 18*l.* was paid, and

(a) *Hardres*, 320.



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then the plaintiff had no cause of action. If this declaration be treated as claiming the increased rent, it is uncertain and bad for not shewing when it accrued: *Piltarfe v. Darby* (a). Under the declaration in its present form, the plaintiff is not entitled to the 10*l.*, for every ton of manure sold, as liquidated damages, but at most to nominal damages: *Hurst v. Hurst* (b).

*Welsby and Coxon*, in support of the rule.—First, the declaration is good for the increased rent. [*Pollock*, C. B.—Is not the provision as to the rent void for uncertainty? *Bramwell*, B.—If so, the declaration may be good, the covenant being a prohibition with an unmeaning qualification.] There is a covenant not to sell manure, under a penalty which attaches at once upon the sale. [*Pollock*, C. B.—If land is let at a rent of 10*l.* a year, the lessor cannot distrain immediately. To what is the “increased rent” to be added?] It is an agreed payment in the nature of a reservation upon the doing of the act stipulated against. There is a positive covenant that the defendant will *not* sell manure; against which no permission to do so can be implied. The cases all shew that, where a particular sum is stipulated to be paid on the doing of a prohibited act, the amount is recoverable as liquidated damages if the act is done. The case of *Hurst v. Hurst* (b) is not intelligible. Secondly, if the Court is of opinion that the second breach is bad, they will make the rule absolute, and the defendant can then apply to arrest the judgment. The issue on the plea becomes immaterial, and the defendant is not entitled to any judgment in respect of it. [*Bramwell*, B.—The case is similar to that of a demurrer to a plea to a bad declaration (c). *Wilde*, B.—The plaintiff cannot have judgment unless he is entitled to it upon the whole record.]

(a) 1 Show. 9.

(b) 4 Exch. 579.

(c) He also referred to the form

of judgment non obstante veredicto in Chitty's Forms, p. 828,  
7th ed.



POLLOCK, C. B.—The question is, whether the plaintiff is entitled to judgment non obstante veredicto. The plea is clearly bad. In answer to a complaint that the defendant has broken his covenant, the plea alleges that the defendant has done something which is as advantageous to the plaintiff as if the defendant had observed his covenant. The defendant has no right to substitute something else for that which he agreed to observe. But, in order to determine whether the plaintiff is entitled to judgment, it is necessary to consider the true meaning of the covenant upon which the action is brought. I have considerable difficulty in saying what, in point of law, is the meaning of a covenant not to do a particular thing “under the increased rent of 10*l*.;” not saying what is to be increased, whether it is the rent from year to year, or the quarterly rent, or whether it is an additional rent or sum of 10*l*. to be paid immediately on the act being done. But the result is that, although the defendant covenants that he will not sell or carry away any manure, it is “under” certain conditions, viz. not *unless* he pays an “increased rent of 10*l*. for every ton so given, sold or carried away.” The word “unless” would give the defendant a permission to remove manure if he paid the increased rent. And it appears to me that, although the covenant is in form absolute, yet its meaning is that the defendant is not permitted to take away manure except on paying a certain price, and if he is willing to pay that price he may remove it. Therefore the defendant can justify the removal provided he pays the increased rent. The cases of *Lowe v. Peers* (a), *Anonymous* (b), and *Hurst v. Hurst* (c) shew that, in suing on such a covenant, the plaintiff must allege that the defendant has not paid the sum which he has the option of paying.

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(a) 4 Burr. 2225.

(b) Hardres, 320.

(c) 4 Exch. 579. †



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With respect to the case of *Hurst v. Hurst* (a), my brother *Channell* has referred me to the report in the 19 Law Journal, Exch., p. 413, which seems to remove the difficulty as to that case. The Court meant to say,—that the 20*l.* was not a penalty, but *liquidated* damages, but if the plaintiff meant to sue for liquidated damages, he should have alleged that the 20*l.* was not paid, according to the case of *Lowe v. Peers* (b). In *Hurst v. Hurst* (c) the payment of the 20*l.* was not negatived. What was passing in my brother *Parke's* mind was that, as the plaintiff had, in his declaration, blended together the 20*l.* and the value of the trees, the only way to make sense of it was to treat it as a claim for unliquidated damages only.

BRAMWELL, B.—I am of the same opinion. The first question is, whether the plea is bad. As my Lord has stated, the defendant attempts to say that by breaking his covenant he has conferred a benefit on the plaintiff. The plain meaning of the covenant is that the covenantor shall not take away manure. Having broken his covenant in that respect, it is no answer that he has brought back an equivalent. But it was contended by Mr. *Grove* that, if the declaration shewed no cause of action, there could be no judgment non obstante veredicto, because in order to entitle the plaintiff to such judgment the declaration must be good. In *Dr. Bonham's Case* (d) it is said, “if it appears upon the whole record that the plaintiff has no cause of action, he shall never have judgment though the bar or

(a) 4 Exch. 579.

(b) 4 Burr. 2225.

(c) In the copy belonging to the Court of Exchequer the report has been corrected by *Pollock*, C.B., as follows:—Page 579, line 7, for “unliquidated” read

“liquidated,” and insert after the word “damage,” “but the action being brought for the penalty plus the value of the tree, the action is for unliquidated damages.”

(d) 8 Rep. 120 b; see also *Turnor's Case*, 8 Rep. 133 b.



rejoinder, &c., be insufficient." Indeed it would be a contradiction in terms to say that the plaintiff shall have judgment non obstante veredicto, when the defendant would have a right immediately afterwards to ask that the judgment should be arrested. I think that the declaration is bad. There are three classes of covenants: first, covenants not to do particular acts, with a penalty for doing them, which are within the statute 8 & 9 Wm. 3, c. 11; secondly, covenants not to do an act, with liquidated damages to be paid if the act is done, which are not within the statute; and, thirdly, covenants that acts shall not be done, unless subject to a certain payment. I think that the meaning of the covenant "not to sell or carry away manure under an increased rent of 10*L*. for every ton" &c. is that the covenantor may do so on paying that rent. If that is the true construction of the covenant, the declaration ought to have alleged that the increased rent was due and not paid. I cannot help observing that the case of *Hurst v. Hurst* (a) seems to me to have been rightly decided. There the Court held the covenant to be within the second class of covenants to which I have alluded, viz. that the covenantor should not do the act stipulated against, with a provision for the payment of liquidated damages which was introduced for the benefit, not of the covenantor, but of the covenantee. Suppose a man covenants not to remove manure, and further covenants that if he does he will pay 10*L*., he may do damage to the amount of 100*L*. But I think that there, the second covenant may be taken to be one for the benefit of the covenantee. That would be the only way to make both covenants intelligible; the other construction would treat the whole as one covenant. It seems to me that on this ground *Hurst v. Hurst* was well decided.

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There *Parke*, B., said, that the breach was capable of two constructions—the plaintiff might be seeking to recover damages for the breach of covenant in cutting the trees, or he might be suing for the penalty. Therefore he treated it as if there were two covenants, one an absolute covenant not to cut the trees, the other to pay the penalty if that was done, and that the plaintiff was suing on the first covenant. But we decide this case on the ground that here there is only one covenant—a complex one, and that the plaintiff can only recover the agreed 10*l.* for each ton of manure sold. Therefore the plaintiff should have alleged, as a breach, that the increased rent had become due and that it was not paid, and, not having done so, the declaration is bad. I have had some doubt whether the declaration might not be taken to allege, by implication, that this increased rent is unpaid; but, on consideration, I think that is not so: and the test is that it would be impossible to plead payment into Court of the increased rent.

CHANNELL, B.—I agree that the rule must be discharged. The rule asks for judgment for the plaintiff notwithstanding the finding on the fifth issue. That involves the question whether the plea is good or bad. If that had been the only question there would have been no difficulty; but it is not enough for the plaintiff to establish that the plea is bad, unless he can shew that he is entitled to judgment upon the whole record, or rather upon that part of the declaration to which the plea is pleaded. But in my opinion the last breach is badly assigned, and shews no cause of action. There is no case in point. I do not rely on the case of *Hurst v. Hurst* (a), which is distinguishable on the ground stated by my brother *Bramwell*. That decision is explained on referring to the

(a) 4 Exch. 579.



report in the Law Journal, though the variance between the language of the two reports appears at first very slight. We are therefore called upon to put the best construction we can upon the covenant as set out in the declaration. I am of opinion that the covenant is not an absolute covenant on the part of the defendant not to remove the manure, that the breach is bad for not averring that the 10*l.* was not paid, and that there is no breach of covenant if the defendant has paid the penal rent of 10*l.* for every ton taken away.

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WILDE, B.—I am of the same opinion. The plea is clearly bad, and the only question is whether the declaration is good. The declaration sets out a covenant by the defendant that he will not sell or carry away from the demised premises, any manure, &c., without the consent in writing of the plaintiff, under the increased rent of 10*l.* for every ton so carried away. Now there are various forms in which a covenant of this sort may be expressed; a man may covenant simply that he will not do such an act, or that if he does he shall pay a penalty, or that if he does any such act he shall pay liquidated damages. Had the covenant been in either of those forms, it would have been substantially a covenant not to do the act, with a subsequent covenant that if he did it he should pay a penalty or liquidated damages. But the covenant in this case is not in either of these forms. It is a single covenant, not two covenants, that the covenantor will not remove manure, under an increased rent of 10*l.* for every ton carried away. The word rent points not only to the injury to the covenantee, but to the benefit the covenantor may derive from doing the act which is prohibited. It is on that ground, amongst other reasons, that I think that the meaning is that the covenantor may remove manure if he chooses to pay the increased rent. It is a mere question of the construction of



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the covenant, which is to be determined by considering the ordinary and natural meaning of the words. The declaration is bad for not alleging that the increased rent was due, and that it was not paid.

Rule discharged.

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The deed of settlement of a Joint Stock Company, completely registered under the 7 & 8 Vict. c. 110, contained a clause "that no other business shall be transacted at a special general meeting than the business for which it shall have been expressly called." The Company was afterwards registered under the 19 & 20 Vict.

c. 47. After the passing of the 20 & 21 Vict. c. 14, at a general meeting it was resolved that the Company should be wound up voluntarily, and liquidators were appointed. The meeting was held in pursuance of a notice, which however did not state the intention of the Company to appoint liquidators at that meeting. In an action to recover calls made by the liquidators so appointed:—*Held*, that the above clause applied to a meeting held for the purpose of appointing liquidators, and that, no notice of the intention to appoint liquidators having been given, their appointment was invalid.

**DECLARATION.**—That before and at the time of the passing of the "Joint Stock Companies Act, 1856," and after passing of the 7 & 8 Vict. c. 110, the plaintiffs had become and were a completely registered incorporated Joint Stock Company, for the purpose of working certain mines, &c. That after the passing of the first mentioned Act, the plaintiffs obtained a certificate of registration and incorporation as a Joint Stock Company, &c. That after the passing of the first mentioned Act, and after the plaintiffs had become a registered, incorporated Joint Stock Company, &c., the said Company, in general meeting duly held under and according to the provisions of the said first mentioned Act, duly passed a special resolution requiring the said Company to be wound up voluntarily (a).

(a) There was a demurrer to some of the pleas, and amongst the defendants' points was one "that it is neither expressly or impliedly averred, that the first meeting at which the special re-

solution was passed was duly convened, or that notice of the intention to propose such a resolution was duly given within the 34th section of the Joint Stock Companies Act, 1856."



That at a subsequent general meeting of the said Company, of which notice was duly given, and which was duly held according to the provisions of the said first mentioned Act, at an interval of not less than one month nor more than three months from the date of the meeting at which such special resolution was first passed, the special resolution passed at the first mentioned meeting was duly confirmed, at the said second or subsequent meeting, by a majority of such shareholders, for the time being entitled to vote, as were present in person or by proxy at such subsequent meeting. That notice of the said special general meeting and confirmation was duly given in the London Gazette, &c. That after the passing of the special resolution, and after the confirmation thereof in pursuance of such special resolution, the Company, in general meeting duly held &c., duly appointed certain persons as liquidators for the purpose of winding up the affairs of the Company, and distributing the property &c. That the liquidators duly accepted the appointment. That the defendant was &c. and is a shareholder, and possessed of 366 shares of 10s. each in the said Company, and at the time of making the call was a contributory, within the true intent and meaning of the Joint Stock Companies Acts then in force, as a shareholder in respect of the said shares, and, as such, a shareholder and a contributory liable to the call hereinbefore mentioned, under and by virtue of the provisions of the said first mentioned Act. That after the passing of the said special resolution and the confirmation thereof, and after the appointment of the liquidators, and their acceptance of such appointment, and before the liquidators had ascertained the sufficiency of the assets of the Company, or the debts in respect of which the several classes of contributories were liable, the liquidators, under and according to the provisions of the Joint Stock Companies Acts then in force, duly called on the defendant, as such shareholder and contribu-

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tory, to pay on a certain day, which elapsed before this suit, 54*l.* 18*s.*, being a call of 3*s.* on each of the defendant's shares; which sums did not exceed the extent of the liability of the defendant as such contributory, and which sums the liquidators deemed, and which were in fact necessary to satisfy the debts of the Company and the costs of winding it up; of which call notice was duly given to the defendant, and he was then requested by the liquidators, and by the Company, to pay the same. That all conditions precedent, matters and things, and all times required to have been performed and to have happened and existed, and to have elapsed, in order to the due registration and incorporation of the plaintiffs as such Company, and the certifying thereof, under and in pursuance of the provisions of the several Acts; and in order to the defendant being such shareholder and contributory; and in order to the passing and giving notice of the special resolution for the winding up of the Company, and the confirmation thereof; and in order to the valid appointment of the liquidators, and to their acceptance of such appointment; and in order to the valid making of the call by the liquidators, and to the notice thereof; and to the liability of the defendant to pay the call, were performed and happened &c.: and the defendant thereupon became and was liable to pay the said call &c., yet the defendant has never at any time paid to the said liquidators, or either of them, or to the plaintiffs, the said call or any part thereof, &c.

The defendant pleaded:—Eighthly, that the meeting at which the said liquidators are in the declaration alleged to have been appointed was not duly held as alleged. Ninthly, that no notice of holding the said meeting for the appointment of the said liquidators was ever given to him. Tenthly, that the said Company did not duly appoint the said liquidators as alleged.

On these pleas issues were joined.



At the trial, before *Martin, B.*, at the Sittings in London after Trinity Term, it appeared that the Company had been completely registered under the 7 & 8 Vict. c. 110. The deed of settlement contained the following clauses.

"14. That every general meeting, whether ordinary or extraordinary, whether original or adjourned (provided the day fixed for holding the same adjourned meeting be more than fourteen days after the meeting from which the adjournment shall take place), shall be called by the board of directors or the shareholders signing such requisition and giving such notice as aforesaid, as the case may be, by advertising the same in two or more of the daily newspapers published in London or Westminster, or by such advertisement and other means as the directors shall deem fit; and that such advertisement shall, in the case of an original general meeting, whether ordinary or extraordinary, give at least three, and not more than fourteen, days' notice of such meeting, and the place, day and hour of holding the same; and that such advertisement, shall express, in cases where the same shall be required by any of the provisions herein contained, the object or objects of such meeting, or the business proposed to be transacted thereat.

"20. That no other business shall be transacted at an extraordinary general meeting than the business for which it shall have been expressly called, and no other business shall be transacted at an adjourned general meeting, or successive adjourned general meetings, than the business left unfinished at the original general meeting whence the adjournment, or successive adjournments, took place; and every adjourned meeting, or successive adjourned meeting, shall be considered a continuance of the original meeting from which the adjournment took place, and be, to all intents and purposes, the same meeting."

The Company was subsequently registered under the

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Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47).

On the 12th of June, 1857, a resolution was passed that the Company should be wound up voluntarily and dissolved.

Liquidators were then appointed, and other steps taken for that purpose. In September, 1858, it was discovered that the proceedings were informal; and, on the 8th of that month, an advertisement was published in the "Times" and other newspapers as follows:—

"Anglo-Californian Gold Mining Company, Gresham House, Old Broad Street, Sept. 6, 1858.—Notice is hereby given, that a special general meeting of the shareholders of this Company will be held at the Company's offices on Wednesday, the 29th day of September instant, at one o'clock precisely, when a special resolution will be proposed that the Company be wound up voluntarily. And it will also be proposed that the acts of the liquidators appointed on the 12th of June, 1857, be confirmed and adopted.

"By order. Signed. G. F. Goodman, Secy."

The following resolutions were passed at the meeting held on the 29th of September.

"1st. That the Company be wound up voluntarily.

"2nd. That the gentlemen appointed at the special general meeting, held on the 12th of June, 1857, liquidators to wind up the affairs of the Company be, and they are hereby appointed liquidators to wind up the affairs of the said Company under the foregoing resolution, and that their acts, under the appointment made on the 12th of June, 1857, be and they are hereby adopted and confirmed."

Notice of a meeting to confirm the above resolutions was given, and, at the meeting held in pursuance of such notice on the 1st of November, 1858, the above resolutions were confirmed, and liquidators were appointed, who afterwards made the call in respect of which the action was brought.

The learned Judge directed a verdict for the plaintiffs, leave



being reserved to the defendant to move to enter a verdict upon the eighth, ninth and tenth pleas, on the ground that the notice of the meeting at which the liquidators were appointed did not state that their appointment was one of the objects of the meeting; and that no sufficient notice of such meeting was given; and that the meeting was not duly convened and held.

*Knowles* having obtained a rule nisi accordingly,

*Watkin Williams* now shewed cause.—The question is, whether, in the advertisement of the meeting called for the purpose of winding up the Company, it was necessary to give notice of the intention to appoint liquidators. Resolutions for winding up the Company, and for the appointment of liquidators, must be passed at general meetings: 19 & 20 Vict. c. 47, ss. 102, 104. The resolution for appointing liquidators was passed at a general meeting duly held pursuant to the 14th clause of the deed; and, though by the 102nd section the resolution for winding up the Company is to be a “special resolution,” that does not mean that it is to be a resolution passed at an *extraordinary general meeting*, but refers to the *majority* by which the resolution is to be passed: 19 & 20 Vict. c. 47, s. 34. “Table B.” does not affect this question. The 113th section of the 19 & 20 Vict. has been repealed by the 33rd section of the 20 & 21 Vict. c. 14. The special provisions of clause 20, as to extraordinary general meetings, do not apply to a meeting for the winding up of the Company, because that was a matter not contemplated or intended to be provided for by the deed of settlement. The appointment of liquidators was therefore good, under the 104th section of the 19 & 20 Vict. c. 47. It may be that notice of winding up the Company necessarily implies that liquidators would be appointed, because a Company cannot be wound up without the appointment of liquidators. If

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so, in any view of the case, the notice was sufficient. [*Channell, B.*—Liquidators would not necessarily be appointed at the time of the passing of the resolution for winding up the Company. The appointment might take place at a subsequent meeting.]

*Knowles and Beresford*, who appeared to support the rule, were not called upon.

**POLLOCK, C. B.**—We think that there was no sufficient notice of the business to be transacted at the meeting at which the liquidators were appointed, and that therefore the appointment was invalid. The question turns on the effect of the 19 & 20 Vict. c. 47, ss. 9 and 113, and the 20 & 21 Vict. c. 14, s. 33. The Company was formed under a deed of settlement before the passing of the 19 & 20 Vict. c. 47, and by the 20th clause of their deed it was provided that no other business should be transacted at an extraordinary general meeting than the business for which it should have been expressly called. We have to determine what is the effect of this clause. *Mr. Williams* contends that, though registered under the Joint Stock Companies Act, 1856, that registration did not make "Table B." binding on the Company, but that they are only bound by their own deed of settlement; and that, as the deed did not contemplate winding up, the 20th clause does not apply to meetings for that purpose. If the 113th section of the 19 & 20 Vict. c. 47 had been still in force, the point would have been clear, because by the registration all the provisions of "Table B." not inconsistent with the clauses of the deed of settlement would apply. But the 113th section of the 19 & 20 Vict. c. 47 is repealed by the 20 & 21 Vict. c. 14, s. 33, by which it is enacted, as to the Companies therein mentioned, that the provisions in the instrument constituting or regulating any Company that has been



registered under the 113th section, or that might thereafter be registered under that section, shall be deemed to be regulations of the Company &c., with a proviso that Table B. shall not, unless adopted by special resolution, apply to any such Company. The 20th clause of the deed provides that no business shall be transacted at an extraordinary general meeting other than the business for which it shall have been expressly called. The question then is, Was this meeting an extraordinary meeting? At an ordinary general meeting, which all the members may be expected to attend, the members assembled may bring forward resolutions with or without previous notice; but at an extraordinary meeting nothing can be done unless notice has been given. This regulation would apply to any new matter not coming within the scope of the ordinary business of the Company. The meeting was an extraordinary meeting; therefore liquidators could not be chosen at that meeting because notice had not been given beforehand of the intention to do so. Therefore we are of opinion that the objection to the proceedings is well founded, and the rule must be made absolute to enter a nonsuit.

BRAMWELL, B.—I am of the same opinion. The question is, whether the power of the meeting to appoint liquidators is governed by the 20th clause of the deed. If so, the appointment is bad, because there was no notice that liquidators would be appointed at the meeting, as required by that clause. A sort of doubt was thrown out, whether the appointment of liquidators was not part of the routine of the business and therefore not within the 20th clause. If the deed had contained the provision of the 19 & 20 Vict. c. 47 as to voluntary winding up, it could not have been doubted but that the appointment of liquidators was a matter of which notice must have been given.

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The statute incorporates with the deed additional provisions, and Mr. *Williams* contended that because winding up was not contemplated when the deed was framed, the 20th clause does not apply to provisions not in existence when the deed was framed. But the answer is that the statute incorporates the provisions of the deed, and nothing can be done under the additional powers except in the manner provided by the deed.

CHANNELL, B.—The question is, whether the liquidators were duly appointed; and that turns upon the point whether a special notice that liquidators were to be chosen was necessary. I think it was. If the case turned on the 113th section of the 19 & 20 Vict. c. 47, it would be clear. But that section is repealed by the 20 & 21 Vict. c. 14, s. 33, which provides that Table B. shall not apply to Companies registered under the 113th section unless adopted by special resolution. But the 33rd section sets up the deed of settlement as regulating the Company. Clauses 14 and 20 make it necessary to give notice of the objects of the meeting appointing liquidators, which by concession is an extraordinary general meeting. I am therefore of opinion that the liquidators were not properly appointed, and the rule must be absolute.

WILDE, B.—I am of the same opinion. The 113th section of the 19 & 20 Vict. c. 47 having been repealed, the question depends upon the deed of settlement. By the 104th section of the 19 & 20 Vict. c. 47 (3) the Company in general meeting may appoint liquidators. Have they duly appointed liquidators at a general meeting? That depends on the question whether the meeting was duly called under the deed of settlement. The 14th clause speaks of three classes of general meetings—ordinary, ex-



traordinary, and adjourned. It makes provision as to the necessary notice for the calling of each by advertisement, and it says that such advertisement shall express, when required by any of the provisions of the deed of settlement, the object or objects of such meeting, or the business proposed to be transacted thereat. The 20th clause makes no provision for any notice of the object of an ordinary general meeting or adjourned general meeting; the only case where notice is required is where the meeting is extraordinary. This is exactly what one would expect. Shareholders know that the usual business of the Company will be transacted at the ordinary general meetings, and they might be informed of what would be done at an adjourned general meeting; but in case of an extraordinary general meeting they have no means of knowing what is to be done, unless they have notice by the advertisement calling the meeting. This was extraordinary business—the appointment of liquidators. It is said that, at the time of executing the deed, the shareholders did not contemplate the appointment of liquidators; but that is equally true of a variety of matters to which their attention might afterwards be directed. For these reasons I think that the rule should be made absolute.

Rule absolute to enter a nonsuit.

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PATIENCE SWINFEN *v.* BACON.

A tenant holding over after the expiration of a notice to quit, is not liable to pay double value, under 4 Geo. 2, c. 28, s. 1, if such holding over is not wilful and contumacious, but *bonâ fide* and for his own protection.

**D**EBT, on the statute 4 Geo. 2, c. 28, s. 1, for double the yearly value of a certain farm wilfully held over by the tenant after the determination of the term, the expiration of a notice to quit, and a demand of possession.

Plea (*inter alia*).—Thirdly, that the defendant did not wilfully hold over the said tenements after the termination of the defendant's term and tenancy and after the notice. Issue thereon.

By consent of the parties and the order of a Judge a case was stated for the opinion of this Court, in substance as follows:—

For many years previous to the death of Samuel Swinfen the defendant rented the farm from him as tenant from year to year at 430*l.* a year. S. Swinfen was seised in fee of the farm. S. Swinfen died on the 26th of July, 1854, and the plaintiff alleged that S. Swinfen had devised the said farm to her in fee. The defendant attorned and paid to the plaintiff the rent due at Michaelmas, 1854, and Lady Day, 1855, at which time he took from the plaintiff about 30 acres of land, which came to her under the will, in addition to what he had before, and they agreed upon the rent of 535*l.* 9*s.* for the whole. The game was verbally reserved to the plaintiff.

On the 12th of July, 1855, Captain Swinfen filed a bill in Chancery to impeach the validity of the will. The Master of the Rolls directed an issue, *devisavit vel non*. The defendant paid to the plaintiff, at the usual rent day, the rent, as recently increased, due Michaelmas, 1855. In March, 1856, the issue came on for trial, Mrs. Swinfen being plaintiff, and Captain Swinfen defendant. In the absence and contrary



to the instructions of the plaintiff a compromise was arranged between the counsel, on which an order of Nisi Prius, dated the 12th of March, 1856, was made as follows:—

“It is ordered by the Court, with the consent of the parties, their counsel and attornies, that the jury be discharged from giving any verdict in this action upon the following terms; namely: The estate in question in this cause to be conveyed by the plaintiff at law to the defendant in fee, free from incumbrances (if any) created since the death of Samuel Swinfen (such conveyance to bear date from the 29th of September, 1855). The defendant to secure to the plaintiff an annuity of 1000*l.*, &c., such annuity also to bear date and be computed from the said 29th day of September, 1855,” &c.

The order of Nisi Prius was afterwards made a rule of Court, and served on the plaintiff, but she refused to obey it. Captain Swinfen, in June of that year, obtained a rule for an attachment against her, but it was discharged.

On the 20th of June the defendant received from Captain Swinfen's solicitors a letter stating that, on the 1st of July, they would “attend to receive the half year's rent due Lady Day last to Captain Swinfen,” and giving the defendant “notice not to pay rent to any other person,” and that if he did he would “be considered as denying Captain Swinfen's title and treated as a trespasser.”

On the 30th of June the defendant received a letter from the plaintiff's attorney, stating that the plaintiff alone was “entitled to receive the rents and give a valid discharge for the same,” and that she would “expect the payment in the usual manner.”

On the 1st of July the defendant paid to Captain Swinfen the Lady Day rent. On the 29th of September the plaintiff served on the defendant a valid notice to quit the farm at Lady Day, 1857. The defendant gave the plaintiff and

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her gamekeeper notice not to trespass on the farm. In November, Captain Swinfen obtained a second rule nisi for an attachment against the plaintiff, which was discharged. In December the plaintiff levied a distress on the defendant's goods for one year's rent. The defendant replevied. The rent due Michaelmas, 1856, was not paid. On the 14th of February, Captain Swinfen filed a supplemental bill to enforce the compromise.

The defendant did not quit the premises at Lady Day, 1857, pursuant to the notice; and on the 20th of April, 1857, the plaintiff served the defendant with notice that in consequence of his holding over she would require him to pay double the former rent.

The defendant continued in possession.

On the 10th of November the Master of the Rolls dismissed the supplemental bill, and directed the issue to be tried at the March Assizes.

Eventually, the rent due on the 25th of March, 1857, being one year and a half, was paid into the Bank, with the privity of the Accountant General of the Court of Chancery, to the credit of the cause. The plaintiff has since received this money out of Court.

Captain Swinfen appealed to the Lords Justices, and on the 25th of March, 1858, they dismissed the appeal. At the Summer Assizes at Stafford the jury gave a verdict for the plaintiff, establishing the will. In November, 1858, Captain Swinfen made a motion before the Master of the Rolls for a new trial.

On the 9th of February, the defendant, being still in possession, tendered to the plaintiff's agent the rent which had accrued since the last payment into Court, at the rate agreed upon in March, 1855.

The Master of the Rolls, on the 5th of March, 1859, when the cause came on for further consideration, holding



the will to be valid, dismissed that part of Captain Swinfen's bill.

The defendant continued in possession till Lady Day, 1859, and then quitted.

It was admitted that the defendant held possession of the lands with the consent and at the request of Captain Swinfen, believing that Captain Swinfen was entitled to the estate; and that the defendant was assisting him in asserting his claim thereto; and also that the retention of the farm was of material benefit to the defendant.

All the proceedings and documents which had been used or referred to in the causes of *Swinfen v. Swinfen and Others*, and *Swinfen v. Swinfen* in Chancery, and *Swinfen v. Swinfen* in the Common Pleas, are to be referred to, and the Court are to have power to draw any inference of fact therefrom as well as from the statements in this case.

The double value is agreed at 2141*l.* &c.

The question for the determination of the Court is whether the plaintiff is entitled to recover double value. If so, judgment is to be entered for her for 1040*l.* 18*s.* If she is not entitled, judgment is to be entered for the defendant.

*Gray* argued for the plaintiff.—The compromise, which provided that the plaintiff should convey to Captain Swinfen, admits that the plaintiff was legally entitled to the estate, and therefore able to give a good notice to quit. In holding over, the defendant did so at the request of Captain Swinfen, and was assisting him in asserting his claim. The defendant was acting as a partizan, hostilely to the plaintiff. Having taken an additional quantity of land, at an increased rent for the whole, he was estopped from disputing the plaintiff's title. It is not enough to justify a tenant in refusing to quit, pursuant to notice by his landlord, that some other

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person has asserted a title, unless the claim of such person be well founded. [*Pollock*, C. B.—The question seems to be whether the holding over was fraudulent or perverse, or under a fair claim of right: *Wright v. Smith* (a).] In *Reynold v. Edwards* (b) it was held that if a trespass is committed after notice, a judge is bound, under the statute 8 & 9 Wm. 3. c. 11, s. 4, to certify that the trespass was *wilful and malicious*. [*Pollock*, C. B.—I doubt if judges, at the present day, would act upon that authority.] The statute 4 Geo. 2, c. 28, s. 1, is a remedial act: per *Gould*, J., in *Cutting v. Derby* (c), *Wilkinson v. Colley* (d). It should therefore receive a liberal construction.—He also referred to *King v. Burrell* (e).

*Manisty* (with whom was *Macnamara*) appeared to argue for the defendant, but was not called upon.

POLLOCK, C. B.—Every one acquainted with Mr. *Gray's* learning and diligence will feel sure that we have had the whole legal question exhausted by his argument. And it is satisfactory to feel assured that there are no authorities which conflict with *Wright v. Smith* (f) and *Soulsby v. Neving* (g). Though the Act was probably passed for the benefit of landlords, we are glad to find so few instances where landlords have attempted to enforce the penalty unfairly. It is creditable to the moderation and kindness which ought to, and, in point of fact, do prevail. It is not necessary to advert to the cases cited for the plaintiff, not one of which appears to have any real bearing on the subject in dispute. In *Wright v. Smith* (f) the Court of Exchequer held that

(a) 5 Esp. 203.

(b) 6 T. R. 11.

(c) 2 W. Black. 1075. 1077.

(d) 5 Burr. 2694. 2698

(e) 12 A. & E. 460.

(f) 5 Esp. 203. 215.

(g) 9 East, 310. 313.



the Act could never be meant to apply to a case where no fraud was intended, and where the resistance to possession was under a fair claim of right:—"The true construction of the Act appears to be, that where there is clear contumacy in the tenant he shall be within the penalty of the Act; for if there is any doubt, if he had any fair ground of defence, and that defence was *bonâ fide* taken, it would be a hard construction to subject him to a *penalty*, for so it is called in the Act, for a fair assertion of title." That decision of the Court of Exchequer in 1805, and the principle upon which it was founded, were recognised by the Court of King's Bench in 1808. In *Soulsby v. Neving* Lord *Ellenborough* said:—"The decision of the Court of Exchequer in *Wright v. Smith* evidently proceeded on the ground that the statute of 4<sup>th</sup> Geo. 2 only meant to apply to the case of a wilful and contumacious holding over by the tenant, after notice to quit, and not to a *bonâ fide* holding over by mistake." In the present case the facts appear to be that the defendant was the tenant of Samuel Swinfen. On the death of Samuel Swinfen the defendant took from the plaintiff some additional land, and agreed to hold at an increased rent. It may be conceded that the old rent was raised, and that there was an attornment by the defendant to the plaintiff. In the mean time Captain Swinfen filed a bill in Chancery against the plaintiff; an issue was directed *devisavit vel non*; the plaintiff was restrained by injunction from interfering with the property; the rents were paid into the Court of Chancery, and the present defendant regularly paid his rent, and the plaintiff received it. But I rest my judgment on other facts. The issue *devisavit vel non* went down to trial, and a compromise was affected by which the estate was given to Captain Swinfen. Mr. *Gray* relies on the language of the compromise, that "the estate should be conveyed by the plaintiff" to Captain Swinfen. But it is idle to treat that as an acknowledgment of the plaintiff's title. It

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is an ordinary mode of admitting the title of an heir at law, and a more graceful way of doing it than by stamping the testator as imbecile. It was never understood by Mrs. Swinfen as an acknowledgment of her title. In that state of things, which we may presume the defendant knew and acted upon, the defendant said, "Captain Swinfen is my landlord." Captain Swinfen assumed the control of the property, and the defendant attorned to him, whereupon the plaintiff gave the defendant notice to quit, and because he failed to do so brings this action against him. It appears to me that the occasion justified the defendant in acting as he did. At all events it is clear he held over, not wilfully or contumaciously, but *bonâ fide*. For these reasons, I am of opinion that defendant is entitled to judgment.

BRAMWELL, B.—I am of the same opinion. If the plaintiff were entitled to recover, it would be an extreme hardship upon the defendant. It is said that hard cases make bad law; but there is an exception to the rule where it is sought to make a person liable for contumacy. The will was propounded by the plaintiff, and contested by the heir at law, who filed a bill in Chancery to establish his claim. The issue directed by that Court resulted in a compromise, which three judges expressly found to be binding on the plaintiff. All that my late brother *Crowder*, the Master of the Rolls or the Lords Justices decided was, that the agreement ought not to be enforced in a summary way. Is the defendant to blame if he thought that compromise binding? In fact, there is nothing to indicate that the plaintiff is not bound; for though, afterwards, the compromise may be said to have been set aside, for aught that I know it may still be enforced by action. If it turned out that the compromise was good, or that the will could not have been established, it is clear that Captain Swinfen might have said to the defendant, "You are still my tenant; your tenancy has not



been determined." Can he then be blamed for having said to the plaintiff, "I shall not accede to your request, and I insist on remaining in possession of the farm"? Mr. *Gray* contended that the terms of the compromise are inconsistent with the notion that the plaintiff had no right to give notice to quit, inasmuch as the compromise recognises the plaintiff's title. But my Lord has given the answer to that. It was also contended that, the defendant having taken twenty acres at an increased rent, there was a new taking, and therefore an estoppel, and consequently the defendant could not question the title of the plaintiff. But, in the first place, that does not obviate the objection that arises from the hardship to which the defendant was exposed. Captain Swinfen might still have been at liberty to treat the defendant as his tenant; and though, possibly, it *might* have been contumacy in a tenant who was an acute real property lawyer or special pleader not to give up possession to the plaintiff under such circumstances, it is a different matter with a tenant farmer. Not that I think it a plain case, but the reverse. If I had been in the situation of the defendant I should have done what he did. For these reasons I think that the defendant is entitled to our judgment.

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CHANNELL, B.—I agree that the defendant is entitled to judgment. I think this is a very plain case. The question turns upon the construction of the 4 Geo. 2, c. 28, s. 1, and if no judicial construction had been put upon that statute, and I had to look at its language for the first time, I should come to the conclusion that this case is not within it. We must place the same construction on the word "wilful" which it received in *Wright v. Smith* (a) and *Soulsby v. Neving* (b); and, applying the principle there laid down, I think that there is no ground for holding the defendant

(a) 5 Esp. 203. 215.

(b) 9 East, 310. 313.



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liable. As I entirely concur in the view of the facts, and in the reasoning of the Lord Chief Baron, I do not think it necessary to say more.

WILDE, B.—Unless we are prepared to overrule the prior decisions as to the construction of this statute, we must say that, to subject himself to the penalty, a tenant holding over after the expiration of a notice to quit must do so contumaciously. Then, was the holding over by the defendant in the present case contumacious? The defendant, having attorned to the plaintiff before any question had arisen as to the title, is said by Mr. *Gray* to have been in the same position as if he had taken a new lease. Captain Swinfen commences a litigation to obtain possession of the estate. There was a compromise, which was embodied in an order of *Nisi prius*, which the defendant, not being a lawyer, or looking strictly into the rights of the parties, but as one of the public, might fairly presume would be carried out. Any ordinary man, at that time, would suppose that the matter had been decided in Captain Swinfen's favour. I cannot conceive what a tenant could do under such circumstances, except treat as his landlord the person who appeared to have the best right. Mrs. Swinfen gave the defendant notice to quit, and distrained upon him for rent. It would be the hardest thing possible, in such a case, to make a tenant pay double rent if he failed to find out which of the two was right. The defendant appears to have considered that person as having the right who practically had the matter decided in his favour. The compromise having been set aside, it is said that this was contumacy. But I think it was not contumacy, and that the defendant simply acted with the desire of doing what was right, and that he is, therefore, entitled to our judgment.

Judgment for the defendant.



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In the matter of WILLIAM THOMPSON, a prisoner.

Nov. 23.

**O**VEREND had obtained a rule calling on H. Slater and R. Wild, Esquires, two of the justices of the county of Lancaster, and on Susannah Taylor, to shew cause why a writ of habeas corpus should not issue, directed to the keeper of the House of Correction at Preston, commanding him to bring up the body of William Thompson.

From the affidavits on which the rule was moved, it appeared that the information charged that William Thompson on the 29th of October, 1860, at the township of Lower Darwen, "did unlawfully assault and abuse Susannah Taylor, contrary to the statute in such case made and provided." The material parts of the commitment were as follows:—Whereas William Thompson was "duly convicted before the undersigned &c., upon the information and complaint of Susannah Taylor, of &c., single woman, in that the said William Thompson, within three calendar months last past, to wit, on &c., at &c., did unlawfully assault and abuse the said Susannah Taylor, contrary to the

On a rule to shew cause why a habeas corpus should not issue to bring up the body of a prisoner, it appeared from the affidavits, that the information charged that one W. T. did "unlawfully assault and abuse" Susannah T. In stating the case before two justices sitting in petty sessions, the prosecutrix's attorney detailed facts, shewing a violation or attempted violation of the prosecutrix's person against her will. The pri-

soner's advocate objected to his giving evidence of anything but a common assault, but, after some argument between the advocates and the justices, it was agreed that the case should be taken under the Aggravated Assaults Act, 16 & 17 Vict. c. 30. The prosecutrix stated that the prisoner began to "rawl" her for about a quarter of an hour; that she rawled till she could not rawl any longer with him, when he put her against a gate and had connexion with her against her will. She was cross-examined as to whether she had not consented to what took place. The justices convicted the prisoner, and in the commitment stated that they found the assault to be proved, and to be of such an aggravated nature that it could not, in the opinion of the justices, be sufficiently punished under the 9 Geo. 4, c. 31; and the justices therefore, in pursuance of the 16 & 17 Vict. c. 30, adjudged the said W. T. to be imprisoned &c. for six months.—*Held*, that the 16 & 17 Vict. c. 30, s. 1, applies only to common assaults, and not to an assault accompanied by any circumstances which make it a distinct offence recognised by the law as something more than a mere assault—such as an assault with intent to commit a rape. *Per totam Curiam*.

*Per Pollock, C. B., and Wilde, B.*, that inasmuch as the charge was not of a common assault, and the evidence did not point to a common assault, but to a rape or an attempt to commit a rape, the justices had no jurisdiction.

*Per Bramwell, B., and Channell, B.*, that the information charged an assault, and that as it was possible that the justices might have disbelieved the charge of rape or attempt to commit a rape, and found that nothing more took place except an assault of an aggravated character, the rule ought not be made absolute.



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statute in such case made and provided. And the said justices did find the said assault to be proved, and to be of such an aggravated nature that it could not, in the opinion of the said justices, be sufficiently punished under the provisions of the statute 9 Geo. 4, c. 31. And the said justices did therefore, in pursuance of the statute passed &c. (16 & 17 Vict. c. 30,) intituled 'An Act for the better prevention and punishment of aggravated assaults upon women and children, and for preventing delay and expense in the administration of certain parts of the criminal law,' adjudge that the said William Thompson, for his said offence, should be imprisoned in the House of Correction at Preston, in the said county, for the space of six calendar months." These, therefore, are to command you &c.

"Given under our hands and seals, this &c.

"H. Slater.

"R. Wild."

One R. Thompson deposed that he was present at the trial, and heard the evidence of Susannah Taylor and the other witnesses; that the only evidence of the assault was that of Susannah Taylor, who swore that on the 29th of October the prisoner "had committed a rape upon her." The words she used were that "he rawled her and melled her, and had connexion with her against her will," and she stated the same on cross-examination &c.; and that when particularly asked by the justices she said that the said William Thompson put his privates into her, and that she screamed violently. (This did not appear in the depositions, and the magistrates' clerk and other deponents did not recollect it.) Other witnesses were examined, but they did not speak to the said assault, but only to a meeting which had taken place for the purpose of arranging the matter without its going before the magistrates.

Affidavits were filed in opposition to the rule, viz. one by



the clerk of the justices, which set out the depositions of the witnesses when before the magistrates, and amongst others that of Susannah Taylor, who said:—When coming to my work I met the prisoner, who after some observation “began to rawl me something like ten minutes or a quarter of an hour. I rawled till I could not rawl any longer with him. He put me against the factory gate and began to mell of, and tried to do, and had connexion with me. I did not consent to his having connexion with me,” &c. She was cross-examined by the prisoner’s advocate, as to whether she made any outcry or complaint to any person of the prisoner’s conduct; she stated that she screamed, but the engine was going, and people could not hear her at some cottages which were near. Other witnesses spoke chiefly as to attempts by the prisoner to settle the matter. Mr. Barlow, an attorney who appeared before the magistrates as advocate for Susannah Taylor, deposed that, “the case having been called on, I proceeded to state the facts to the justices, and whilst doing so Mr. Hall, the prisoner’s advocate, objected to my going into anything but a common assault; but after some argument betwixt myself and Mr. Hall, and the justices, it was agreed that the case should be taken under the Aggravated Assaults Act, and it was so taken and dealt with, and the prisoner was committed under that Act.”

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*Kay* shewed cause (Nov. 22).—First, the commitment is good upon the face of it. The conviction is not before the Court, and unless it is brought before the Court by certiorari they will not look beyond the commitment. The 16 & 17 Vict. c. 30, s. 1, enacts that “when any person shall be charged &c. with an assault upon any female whatever &c., either upon the complaint of the party aggrieved or otherwise, it shall be lawful for the justices &c., if the assault is of such an aggra-



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vated nature that it cannot in their opinion be sufficiently punished under the provisions of the 9 Geo. 4, c. 31, to proceed to hear in a summary way, and, if they shall find the same to be proved, to convict the person accused; and every offender so convicted shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for a period not exceeding six calendar months" &c. If the justices found that the assault was not merely a common assault, but one within the provisions of this section, they were warranted in convicting the prisoner. [*Wilde, B.*—If the evidence points to a rape, can the justices convict the party charged of an assault?] The information does not charge a rape, but rather points to an indecent assault. The Court cannot hold that the word "abuse" means "ravish." Secondly, the justices who were to judge of the facts may have thought that a charge of rape was not made out, but that the charge of assault was proved. At the hearing before the justices, the advocate for the complainant was about to open a charge of rape, when the prisoner's advocate objected that nothing could be gone into but a charge of assault; and it was ultimately agreed that the case should be gone into under the 16 & 17 Vict. c. 30. The word "unlawfully" is used in contradistinction to "feloniously," so that if the word "abuse" could mean "ravish," the charge would be reduced to something less than a charge of feloniously ravishing. [*Wilde, B.*—Was there any evidence of an aggravated assault except what went to prove a rape?]

*Overend* and *Wheeler*, in support of the rule.—The addition of the word "abused" shews that something more than an assault was charged. The charge was really one of rape, and it cannot be reduced to a charge of an aggravated common assault by a private arrangement between the



parties. If "abused" means "indecently assaulted," the jurisdiction of the justices is ousted, for the offence is an indictable misdemeanor. Under the 14 & 15 Vict. c. 100, s. 29, the prisoner had a right to have his case considered by a jury, and therefore the magistrates had no jurisdiction: *Ex parte Jacklin* (a). Where the charge is not such as, if true, would be within the magistrate's jurisdiction, no finding of facts by the magistrates can alter it: *Thompson v. Ingham* (b). The power of the magistrates to deal summarily with cases of aggravated assault, being a statutory power, must be strictly pursued. The Act which originally gave power to justices to deal summarily with cases of assault is the 9 Geo. 4, c. 31. Section 27, after reciting that "it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations hereinafter mentioned," proceeds to enact "that where any person shall unlawfully beat or assault any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence," &c. The 16 & 17 Vict. c. 30, refers expressly to this Act, and applies merely to cases of common assault of an aggravated character. Therefore the justices never had any power to deal summarily with a charge of abusing the complainant, and could not, on such charge, convict the prisoner of a common assault.

*Cur. adv. vult.*

The learned Judges, having differed in opinion, the following judgments were now pronounced.

POLLOCK, C. B.—In the case of *Ex parte Thompson* an application was made for a writ of habeas corpus. A rule nisi having been granted, cause was shewn, and the Court,

(a) 2 D. & L. 103. 106.

(b) 14 Q. B. 710. 718.

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being equally divided in opinion, the writ will not issue. I will state the grounds upon which it appears to me that the writ ought to issue.

The conviction and commitment were under the 16 & 17 Vict. c. 30, s. 1, by which two justices are empowered (if an assault is of such an aggravated nature that it cannot, in their opinion, be sufficiently punished under the provisions of the 9 Geo. 4, c. 31), to extend the punishment which may be inflicted under that Act, and award imprisonment, with or without hard labour, for a period of six calendar months. The objection to the conviction was that the magistrates had exceeded their jurisdiction. Now, their jurisdiction is founded on the 9 Geo. 4, c. 31, s. 27, which enables two justices to deal with a complaint of a *common assault*, and to punish the party guilty of it by inflicting a fine not exceeding 5*l.*, and in default of payment to imprison the offender for a term not exceeding two calendar months. The statute does not speak of an *assault* merely, but of a *common assault*, and it is important to consider what is the meaning of that expression. It appears to me to mean an assault not accompanied with any of those aggravated circumstances which give to it the character of a distinct offence recognised by the law as something more than a mere assault. An assault may be accompanied with violence, from which death ensues, and then the offence would be either murder or manslaughter. Or the assault may be accompanied with the violation of the person of a woman against her will, in which case it would be rape; or, though the purpose was not effected, the circumstances might be such as to leave no doubt of an intention to commit a rape, and then the offence would be an assault with intent to commit a rape. Therefore, an assault may amount to a capital felony, or a felony, or a mere misdemeanour, according to the circum-



stances with which it is accompanied. In my judgment, an assault, with intent to commit a rape, is an offence as distinct from a common assault as murder is from rape. In all these cases the circumstance that the crime is accompanied with an assault does not make the two offences identical, or make them of the same class.

Then the 9 Geo. 4, c. 31, s. 27, having limited the jurisdiction of the magistrates to charges of *common assault*, the 16 & 17 Vict. c. 30, s. 1, although it does not repeat that expression, but merely uses the word *assault*, relates to an assault of the same kind, though of an aggravated nature; for it expressly refers to the punishment imposed by the 9 Geo. 4, c. 31, and provides that, if the justices shall be of opinion that the assault, though a common assault, is of such an aggravated nature that it cannot be sufficiently punished under the provisions of that Act, they may award imprisonment, with or without hard labour, for a period not exceeding six calendar months. It seems to me that, under these statutes, the magistrates have no jurisdiction to entertain any other charge than that of a common assault, and that, as soon as it appears that the charge of assault involves an offence of a distinct character, the magistrates should refuse to entertain it, and send the case for trial either at the quarter sessions or assizes.

The question then is, what, in point of fact, was the charge before the magistrates? Was it a charge of common assault, or a charge of assault accompanied with circumstances which give to it the character of another and a distinct offence? If the former, the magistrates had jurisdiction to entertain it; if the latter, they had no jurisdiction. The case of *Regina v. Bolton* (a) contains a very able summary of the law on this subject; and it points out with remarkable precision the occasions on which the decision of the

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magistrates is conclusive. Where the jurisdiction depends on certain facts being proved or not proved, and the magistrates have treated them as proved, and adjudicated accordingly, their decision is conclusive, and no Court can inquire into their jurisdiction. But, where the nature of the charge is doubtful, and, in the course of the inquiry, it turns out that it is not one over which they have jurisdiction, there is no authority for saying that the superior Courts of law are precluded from examining the evidence and entertaining the question of jurisdiction.

Then what was the charge on the present occasion? The information contains a charge of assaulting and *abusing* a certain woman; therefore, on the face of it, there is a complaint of something more than a mere assault. The expression "abusing" appears to me to import "assaulting" and something more; but when the evidence is read all doubt is removed. The Court of Queen's Bench, to which the same application was made, and which refused to grant a rule to shew cause on this point, was not in the same position as we are, for, in addition to the affidavits in support of the application, others have been filed in support of the conviction, so that we have a distinct statement of all that took place before the magistrates. The complainant detailed a case of violation of her person against her will—not a mere assault.

I am not aware that the word "abuse," applied to a woman, is ever used except with reference to sexual intercourse. Certainly, in more than one act of parliament the word "abuse" has had that meaning applied to it, and in my opinion it always imports some offence of that nature. Then we have these facts:—The information was for "assaulting and abusing," and the evidence of the complainant disclosed a complete case of violation of her person against her will. Can any one say that this was a charge of com-



mon assault? In my opinion it clearly was not. If there was no charge of a common assault, and no evidence of a common assault, the magistrates had no jurisdiction.

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It is said that this is a decision of the magistrates on a question of fact, and therefore conclusive. I admit it would be so if the question was merely as to the truth or falsehood of the complainant's statement. But that is not the case here. It is suggested that the magistrates may have believed her statement as to the assault, but disbelieved it as to a rape or any attempt to commit a rape. To yield to such a suggestion would, in my opinion, be only trifling with what I consider it our duty to guard against, viz. that magistrates do not exceed their jurisdiction, and unlawfully exercise a power of committing any of her Majesty's subjects to prison for a period of six months, perhaps with hard labour, the effect of which would be to prevent all further inquiry respecting the charge of rape. The magistrates in substance pardon it, by disbelieving the woman and treating the offence as a common assault. The moment it appeared that the charge of assault was accompanied with a charge of rape they should have declined to entertain it, for no consent of the complainant could give them jurisdiction.

Thinking, therefore, that the charge was not that of a common assault, but of a distinct and substantive offence, viz. rape, or an assault with intent to commit a rape; thinking also that the magistrates had no right, when such a charge was made, to give themselves jurisdiction by believing some part of the evidence and disbelieving the remainder, I am of opinion that the writ of habeas corpus ought to issue: at all events I think that the prisoner ought to be brought before us, and that the question whether the conviction and commitment are valid in law should be fully argued.



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BRAMWELL, B.—I regret that my opinion is opposed to that of my Lord. I think the rule should be discharged. A preliminary objection was taken by Mr. *Kay*, to which I advert only that it may not be supposed that I think it not well founded. But, assuming that there is sufficient on the face of the documents to warrant the detention of the prisoner, he would be remanded unless he could shew that there was a want of jurisdiction, the question therefore arises, whether it has been shewn that the magistrates had no jurisdiction. I think it clear that magistrates have no power to convict except upon a charge of the offence upon which they do convict. That seems a truism; but no doubt there are cases where, instead of dismissing the charge, and ordering a new one to be preferred, they might say, "Such an offence is not proved, and we dismiss the charge as to that; but such a matter is proved, and we convict as to that." In this case the question is, whether a charge of common assault was brought before the justices; if so, it was competent to them to hear, entertain and determine it, and if they did determine it we cannot review the propriety of their determination. If the charge was one of rape, they ought not to have convicted the prisoner as they have done. So also, if the charge was of any of the assaults to which my Lord has referred, not being common assaults. But I think there was a charge of assault before the justices. The information states that the prisoner "did unlawfully assault and abuse" the complainant. To my mind the word "abused" conveys no definite meaning: it is not a word of art; in popular language it means calling names—abusing by words. The only instance in which it is used as a term of art shews that it does not mean "ravish," because I find in the 9 Geo. 4, c. 31, s. 18, as to trials for the crimes of "rape and of carnally abusing girls" under the ages therein men-



tioned, the term "carnally abusing" is used as meaning something different from rape. The word "abusing" without the concomitant words "unlawfully and carnally" has no definite meaning. The expression "unlawfully assaulted and abused" alleges an assault, with a word which may mean that the prisoner did something else. On the written information, then, there was nothing to preclude the magistrates from entertaining a charge of assault. The only other matter was the opening statement of the prosecutor's attorney. The prisoner's advocate objected that the charge as opened could not be entertained; that the information did not charge a rape. That was agreed to, and the charge of assault was then gone into. The charitable construction is, not that all the parties did what they ought not to have done, but that the prosecutor's attorney agreed that the objection was well founded. The charge appears to me to be a charge of assault, and not of any of the statutory offences which have been spoken of. If the magistrates had jurisdiction, if the charge was one which they had power to entertain, there is an end of the case, because it is possible that the magistrates may have believed that nothing more took place except a common assault of an aggravated character. It is perfectly possible, in point of fact, that the prisoner may have violently laid hold of the woman and insisted on kissing her: that would not be an attempt to commit a rape, but might be a very aggravated assault. Therefore I think that this rule should be discharged, because if the prisoner were brought up he would have to be remanded.

But lest it should be supposed that I think that the magistrates were right in what they did, I wish to make a few observations. I am not disposed to make harsh observations, because I dare say they thought they were warranted in

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doing what they did. The effect of what they have done is, probably, as my Lord has pointed out, that the prisoner is released from all further or other proceedings, civil or criminal, for the same charge. [*Pollock*, C. B.—In my opinion that is the effect of the 9 Geo. 4, c. 31, s. 28.] But whether that is so or not, the magistrates were wrong in dealing with the case as they did. It is impossible that they could have heard the story of the complainant without believing that either a rape or an indecent assault had been committed. The cross-examination of the complainant was directed solely to shew that what had taken place was with her consent; in fact, the only doubt suggested was whether or not she was a consenting party. If so, the first thing to be considered was whether the charge was true. If the magistrates thought it was, they were bound to commit the prisoner on the charge of rape. If they found that what took place was with her consent, they should have dismissed the charge. If they believed that it was not with her consent, they should have dismissed the summons, but they should have committed the prisoner to take his trial. But while I am satisfied that the offence of which the prisoner has been convicted was one into which the justices had the power to inquire, and to convict if they were satisfied that the offence had been committed, yet I think, with my Lord, that it is clear upon the evidence that the magistrates ought not to have come to the conclusion they did. We have, however, no power to review their decision in that respect.

CHANNELL, B.—I concur in the expression of regret that has fallen from the rest of the Court, that there should be a difference of opinion upon this subject, particularly as the liberty of the subject is concerned. Having given the case



the best consideration I am able, I think that no rule should be drawn up in the nature of a rule absolute. It seems to me the question is not whether the magistrates acted wisely or discreetly; and as that is not the question I do not upon that point express any opinion. The question is, whether the magistrates had jurisdiction or not; if they had jurisdiction I think we ought not to interfere. I agree as to the necessity of inquiring into the facts in some cases in order to ascertain whether jurisdiction exists or not; but in this case all the facts were proved which gave jurisdiction. But it is said that in the course of proving those facts something else came out in the evidence which destroyed the jurisdiction. I do not think the magistrates were bound to credit all the evidence of all the witnesses to the full extent; they were at liberty to believe or disbelieve part of the evidence, and if, upon the evidence believed, the case was within their jurisdiction, they had a right to exercise that jurisdiction. This case differs from *Regina v. Bolton*, in which the complaint itself stated something upon the face of it which in terms destroyed the jurisdiction of the magistrates. The magistrates who there convicted found the fact to be as stated in the complaint. The information in this case is laid under the 16 & 17 Vict. c. 30. The objection is, not that the magistrates have not found in terms that there was such an aggravation of the assault that it could not be sufficiently punished under the 9 Geo. 4, but that they found the complaint stated in the information to be true, and it is said the complaint stated in the information is one that took away the jurisdiction of the magistrates. The complaint is that "William Thompson did unlawfully assault and abuse one Susannah Taylor." I think the word unlawfully may be connected with the assault and go far to negative any assault of a felonious character. But by the use of

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the word abuse it is said that the jurisdiction under the statute 16 & 17 Vict. c. 30 is taken away. I cannot come to that conclusion. The word "abuse" may be surplusage, or it may mean something. I do not think it can be reasonably understood in the sense that opprobrious epithets were used, and that the assault committed was the more aggravated because it was accompanied by such epithets. I think it must be read as meaning some abuse of the person, that there was an assault and some indecency committed with regard to the person of the complainant. But I am unable to come to the conclusion that the assault is not an aggravated assault, within the meaning of the 16 & 17 Vict. c. 30, because it is also an indecent assault. The indecency may well be the very aggravation connected with the assault which gave the magistrates jurisdiction, and yet the assault stop short of felony. If this had been a charge of rape, I agree with the rest of the Court that the jurisdiction is entirely gone. I do not put this case on the ground of any agreement to give the magistrates jurisdiction. I utterly repudiate that. I think, on reading the affidavit, that no such agreement was come to. The affidavit is drawn up in a very loose way, and the information is framed in a very loose way. It appears to me that the person who framed the information and the affidavit did not rightly understand what he was about. I apprehend the true meaning of the affidavit to be, that an objection was taken that the magistrates had no jurisdiction if it was a charge of rape. That was acquiesced in. The prosecutor went on to prefer the charge in the information. The 16 & 17 Vict. c. 30 gives the magistrates jurisdiction in cases of an assault, if it shall appear to be such an aggravated assault that it cannot be properly punished under the 9 Geo. 4. The words are "an assault;" that is the only expression in this statute. In the 9 Geo. 4,



the words "common assault" are used ; but the word "common" is not in the 16 & 17 Vict. c. 30, s. 1. In my opinion the aggravation may consist of indecency, stopping far short of anything like an intent to commit a felony. For these reasons it appears to me, if I am to consider the question of jurisdiction only, there is nothing before us that can enable us to say that the magistrates have exceeded their jurisdiction. I distrust my own opinion, as being in opposition to my Lord Chief Baron and my brother *Wilde* ; but my brother *Bramwell* concurs in the result : and though the matter was not fully argued in the Queen's Bench, the Judges in that Court refused the application for a rule nisi.

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**WILDE, B.**—I am of opinion that this rule ought to be made absolute ; and as I entirely agree with the Lord Chief Baron, if this were not a case of considerable importance in its several bearings, I do not know that I should add anything to what has fallen from him ; but seeing that the Court is divided in opinion, and that the question raised here is one of very general interest, I propose to add a little to what has been already said. The prisoner has been convicted before two justices sitting in petty sessions of an aggravated assault, and sentenced to six calendar months imprisonment. The question is, whether under the circumstances the magistrates had jurisdiction. What is the jurisdiction under the Act under which alone they had power to deal with this matter ? The 9 Geo. 4, c. 31, enumerates a variety of assaults differing from common assaults, such as assaults with intent to commit a felony ; assaults on peace officers or revenue officers in the execution of their duty, or upon any person acting in aid of such officers ; assaults with intent to resist lawful apprehension, assaults committed in pursuance of a conspiracy to



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raise the rate of wages; for which the Court may award imprisonment for any term not exceeding two years. But no power is given to two justices sitting in petty sessions to deal with an assault with intent to commit a felony. Having mentioned these assaults, the statute goes on in the 27th section to say, "And whereas it is expedient that a summary power of punishing persons for *common* assaults and batteries should be provided under the limitations hereinafter contained." So that justices in petty sessions can deal only with common assaults and batteries. Section 29 enacts, that in case the justices shall find the assault to have been accompanied by any attempt to commit a felony, they shall abstain from adjudication thereupon. Nothing can be plainer than that, under this act of parliament, justices sitting in petty sessions have only power to determine summarily cases of common assault and battery. Then, has their jurisdiction been amplified by the 16 & 17 Vict. c. 30? Section 1 enacts, that where any person shall be charged before two justices of the peace with an assault upon any female whatever, or upon any male child, if the assault is of such an aggravated nature that it cannot be sufficiently punished under the provisions of the 9 Geo. 4, c. 31, the justices shall have the power, instead of imprisoning for two months, under the 9 Geo. 4, to imprison for six months. I cannot read that section as meaning anything more than that where the justices have convicted an offender, under the 9 Geo. 4, of an assault, which, though a common assault, is accompanied with such cruelty or violence as not to be sufficiently punished, under the 9 Geo. 4, by two months imprisonment, they are to have the power of imprisoning him for six months. Though the statute gives jurisdiction, it is a jurisdiction to deal with common assaults only, and to increase the punishment if



the common assault is accompanied by circumstances of an aggravated character. The next point is, what was the matter brought before the magistrates on the occasion in question: first, by the information; and secondly, by the facts appearing in evidence? The information charges the defendant with "unlawfully assaulting and abusing" the complainant. I am not prepared to say that the word "abusing" must necessarily be understood as charging violation. If the question turned on the information alone, I should entertain serious doubts whether it must necessarily be read as charging that the prisoner ravished the complainant, though it is capable of being so interpreted. There is however something more than the information. *Regina v. Bolton* (a) shews that we are entitled to look into the facts; and, upon the affidavits filed in answer to the rule, the whole matter is before us. When the evidence is examined, it is clear that it was evidence of a rape or nothing. There was no beating, no violence to the person beyond the violence in the attempt to commit the offence. What then was the duty of the magistrates? I do not mean to say that if there is evidence of an offence over which the magistrates have no jurisdiction, the magistrates may not come to the conclusion that such an offence is not proved, and find that a less offence, over which they have jurisdiction, has been proved. If I could be satisfied that the magistrates had ignored the charge of rape or attempt to commit a rape, and had bonâ fide come to the conclusion that all that took place was a common assault, I should be of opinion that the magistrates had acted rightly and that there would have been no ground for this rule. But it is because I am satisfied that such was not the case, that I think the rule ought to be made absolute. The evidence

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clearly shewed that the charge was one of rape. Looking to the affidavit of the prosecutrix's attorney, we find an explanation of the anomaly of the prisoner having been convicted of a common assault, and then sentenced to six months imprisonment. He says that when the facts were stated, the prisoner's advocate objected to his going into anything but a common assault, and after some argument between the attornies and the justices "it was agreed that the case should be taken under the Aggravated Assaults Act." I cannot, with that statement before me, shut my eyes to the fact that the charge being one of rape, the parties agreed to withdraw it from the proper jurisdiction and turn it into a charge of a common assault of an aggravated description. I think that the magistrates had no jurisdiction, and they could not give themselves jurisdiction by the consent of the prisoner to be tried on a charge of a different character from that which was really before them. I cannot come to the conclusion that the magistrates bonâ fide believed that only a common assault had been committed. The prisoner ought to have been tried by a jury for the offence with which he was charged. If this practice were allowed it would lead to the most serious abuses. However, as the Court is equally divided the rule drops.

Rule discharged.

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GEE and Others, Appellants, THE LANCASHIRE AND YORK-  
SHIRE RAILWAY COMPANY, Respondents.

Nov. 14.

**T**HIS was an appeal from the decision of the judge of the County Court of Lancashire holden at Oldham.

The particulars annexed to the summons were as follows:—The plaintiffs seek to recover damages, “For that the defendants, being common carriers, agreed with the plaintiffs for reward to carry duly upon the defendants’ railway, and to deliver duly to the plaintiffs, fifteen bales of cotton: yet the defendants broke the said agreement by not carrying and delivering within a reasonable time, and neglected and refused to carry and deliver the same for seven days, whereby the plaintiffs were injured in their trade

The plaintiffs delivered to the defendants, who were carriers, ten tons of cotton to be carried from Liverpool to Oldham. In the usual course the cotton should have been received on the following day, but it did not in fact arrive till four days afterwards. In consequence

of the delay a new mill of the plaintiffs was stopped for want of cotton to go on with. At the time of the delivery of the cotton to the defendants nothing was said as to the particular inconvenience likely to result from the delay in forwarding it. But on the day before it was delivered to the defendants, and repeatedly on each succeeding day until it arrived at Oldham, one of the plaintiffs called to inquire about it; and on each occasion told the manager of the goods department at the Oldham station that the mill was at a stand, solely on account of the non-delivery of the cotton. In an action against the defendants for neglect in delivering the cotton, the plaintiffs proved that during the time the mill was at a stand they had paid in wages 7*l.*; and that the profit which would have been made if the mill had been at work was 7*l.* 10*s.* The judge of the County Court told the jury, that when, as in the present case, by the neglect of a carrier, a man had no material to carry on his business, he had a right to charge as legal damage such loss as naturally and immediately arose from stopping the mill; that the plaintiffs were entitled to the money they had actually paid as wages, 7*l.*, and that the profit which the plaintiffs would have made was a fair subject of calculation; and the jury should therefore give, over and above the sum of 7*l.*, such amount as would be the actual loss and detriment the plaintiffs had suffered by the non-arrival of the cotton in due course.—*Held*, that this was a misdirection, and that the plaintiffs were not entitled to the amount of wages paid and of the profits lost as *legal damages*, inasmuch as it assumed that the stoppage of the mill arose entirely from the non-delivery of the cotton, when in fact it arose partly from that and partly from the plaintiffs having no cotton to go on with.

*Seemle*, that the jury might have properly given the amount of the wages and loss of profit as damages, if they had found as a fact that the stoppage of the mill was a consequence of the non-delivery of the cotton which, either from express notice or the course of business in the district, might have been anticipated by the parties at the time of making the contract.

*Quere*, per *Bramwell*, B., whether if, in the course of the performance of a contract, one party gives notice to the other of any particular consequence which will result from a breach of the contract, and the latter, after that notice, persists in breaking the contract, the former may not hold him responsible in damage for the consequences if they result from the breach, though they are not such as would naturally arise, and were not in contemplation of the parties at the time of the contract.

Where, on an appeal from a County Court, a new trial is ordered on the ground of misdirection, the Court will not give costs to the appellant.



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and business as cotton spinners, and they were prevented from working their mill and machinery during each of the said days, and incurred expenses in compensating their workmen for loss of time, and lost great profits."

The case was heard before the judge of the County Court and a jury.

Thomas Gee, one of the plaintiffs, stated that a short time ago the plaintiffs rented a mill at Bottom-o'-the-Moor, near Oldham, which they intended to work, in addition to another mill which they had previously worked. At the beginning of the week commencing on the 22nd of January the mill was ready, and the plaintiffs had engaged a number of hands for it. On Tuesday the 24th, Thomas Gee went to Liverpool and purchased a quantity of cotton for the mill. Ten bales of cotton, part of the purchase, were, on Thursday the 26th of January, about eleven o'clock in the forenoon, delivered to the defendants at the station at Liverpool, to be carried to Oldham to the plaintiffs' mill there.

It was proved that the plaintiffs had been constantly in the habit of purchasing cotton at Liverpool for their old mill and having the same carried by the defendants; and that, on all former occasions, the cotton delivered to the defendants at Liverpool on the afternoon of one day had been delivered at the plaintiffs' mill at Oldham by nine o'clock on the following morning at latest.

The cotton in question was not delivered at the plaintiffs' mill until Monday the 30th at half-past eleven o'clock in the forenoon; and in consequence of the delay the plaintiffs' mill was prevented from being worked on Friday the 27th, Saturday the 28th and half of Monday the 30th. He stated that

|                                                 |   |    |       |
|-------------------------------------------------|---|----|-------|
| His work people were kept idle for the time, to | £ | s. | d.    |
| whom he had to pay wages                        | - | -  | 7 0 0 |



|                                                              |   |    |    |             |
|--------------------------------------------------------------|---|----|----|-------------|
| The rent of the mill was 410 <i>l.</i> , of which a pro-     | £ | s. | d. | 1860.       |
| portion for the time was - - - - -                           | 3 | 10 | 1  | GEE         |
| A capital of 8000 <i>l.</i> , the interest of which, for the |   |    |    | v.          |
| time in question, was - - - - -                              | 2 | 10 | 0  | LANCASHIRE  |
| Profits that would have been made by working                 |   |    |    | AND         |
| the mill for the time in question - - - - -                  | 7 | 10 | 0  | YORKSHIRE   |
|                                                              |   |    |    | RAILWAY Co. |

Thomas Gee further stated, that he expected that the cotton would arrive at Oldham on Wednesday the 25th, and that on that day he made inquiries about the cotton at the defendants' station at Oldham of Jackson, the manager of the goods department. On Thursday the 26th, he again made inquiries of Jackson, and being told that the cotton had not come requested Jackson to telegraph to Liverpool about it. At twelve o'clock on the same day he called at the Oldham station, and was informed by Jackson that he had telegraphed to Liverpool but that no answer had been received. Subsequently he went to the Oldham station several times that day, but could get no information respecting the cotton. On Friday, at nine in the morning, he again called and requested Jackson to telegraph again to Liverpool respecting the cotton. He called several times during the day but was informed that no answer had been received. On Saturday the 28th, about nine o'clock in the morning, he called again and was told that the cotton was then lying at the Middleton station on the defendants' railway, about a mile and a half from Oldham, and that the plaintiffs should have it by ten o'clock in the forenoon.

The first time that Thomas Gee saw Jackson, and on every occasion when he made inquiries, he told him that the mill would be at a stand solely in consequence of the non-delivery of the cotton, and that the plaintiffs would look to the Company for compensation for the loss occasioned. On cross-examination Thomas Gee said, that the fact that the



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mill would be at a standstill if the cotton was not delivered immediately, was not stated to the defendants or their agent at Liverpool by the person who delivered the cotton there at the time of such delivery; that the cotton was delivered in the ordinary way without any special terms or contract as to the delivery thereof at the plaintiffs' mill at Oldham, and that the Company had a daily delivery of goods at Oldham.

The judge told the jury that he thought it was too nice to seek as damages the interest of capital and the proportion of rent; and that the jury must not consider those items in estimating the damages; but when, by the neglect of the carrier, a man had no material to carry on his business, he had a right to charge as legal damage such loss as naturally and immediately arose from the stoppage of the mill. He asked them what was the actual loss and detriment that the plaintiffs suffered by the non-arrival of the cotton in due course. He said the plaintiffs were entitled to the money they had actually paid as wages, viz. 7*L*., and that the profit the plaintiffs would have made was a fair subject of calculation. Mr. Thomas Gee had put it at 7*L* 10*s*. No doubt, however, he had calculated it at the highest amount. The jury therefore should give such damages as they should think proper over the sum of 7*L*., such amount in fact as in their opinion would be the actual loss and detriment that the plaintiffs had sustained by the non-arrival of the cotton in due course.

The jury found a verdict for the plaintiffs, with 15*L* damages.

The defendants were dissatisfied with the direction of the judge as to the damages: therefore they appealed.

*Gray* now argued for the appellants.—The judge of the County Court was in error in telling the jury that



the plaintiffs were entitled to recover, as damages, the wages of their workmen while the mill was at a stand, and the loss of their reasonable profits during that time. In *Le Peintre v. The South Eastern Railway Company*, which was an action for not delivering certain cases of kid skins, *Keating, J.*, ruled that the plaintiffs were not entitled to recover the wages of workmen kept unemployed in consequence of the non-arrival of the skins, or the loss of the profits on the sale of gloves which would have been made had they arrived in due course; and that ruling was upheld by the Court of Queen's Bench (a). It may be said that this case is distinguishable from *Hadley v. Baxendale* (b), because the plaintiff, Thomas Gee, told the servant of the Company that the mill was at a stand. But that was only after the loss, and the notice was not given to the proper person. [*Pollock, C. B.*—Common sense and common justice require that a carrier should only be called upon to pay such damages as may fairly and reasonably be supposed to result from his breach of the contract to deliver, unless he is informed of some special circumstances. *Channell, B.*, referred to *Portman v. Middleton* (c). *Wilde, B.*—The vice of the summing up appears to be, that it makes the matters alluded to the measure of damages. Many circumstances may be taken into consideration by the jury in estimating damages, which cannot be treated as damage to which, as matter of law, a judge can say that the plaintiff is entitled.]

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*Wheeler*, for the respondents.—The result of the argument on the other side is that the plaintiffs are not entitled to any damages. The cotton was delivered to the defendants at Liverpool on Thursday the 26th, and on that day, before the cotton came into their possession, they

(a) Q. B., E. T. April 19, 1860.

(b) 9 Exch. 341.

(c) 4 C. B., N. S. 322.



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had notice that the mill was stopped for want of it. The notice was given to the Company's servant at Oldham: and he telegraphed to Liverpool. [*Wilde, B.*—Not until after the goods had been received. *Pollock, C. B.*—Was not the information given at Oldham, that the mill was at a standstill for want of the cotton, too soon on Wednesday and too late on Thursday?] It was sufficient to bring the damages within the rule in *Hadley v. Baxendale (a)*, viz., such as were in the contemplation of the parties at the time of the contract.

*POLLOCK, C. B.*—This is an appeal against the decision in the County Court, on the ground that the law was improperly laid down by the judge in directing the jury what damages they were to give. In the first place he told the jury that the plaintiffs were entitled to the money they had paid for wages, which was 7*l*. This he treats as a positive item—an amount which the jury ought to give. Then he said that the plaintiffs were entitled to recover whatever actual damage or detriment they had sustained from the non-delivery of the cotton in proper time; that the plaintiffs put the loss of profit at 7*l*. 10*s.*, but no doubt they put it at the highest amount. He assumes this loss to have been sustained in consequence of the non-arrival of the cotton, while in fact it was not in consequence of the non-arrival of the cotton alone, but in consequence of that fact and of the plaintiffs having no other cotton in stock. If it had been established that such is the practice amongst cotton spinners, so that every carrier must have known that the mill would be at a standstill until the cotton arrived, the damages would have been properly assessed. And that would be so whether the carrier had actual notice of the fact, or notice from the well understood course of business. But the business of life is conducted with reference to the necessity

(a) 9 Exch. 341.



of guarding against certain accidents, and owners of cotton mills may fairly be expected to guard against the risk of being delayed, by having something in stock. Is a railway Company bound to take notice, that in a particular case a mill would be at a stand if goods were not delivered on a particular day? I think not. I think a carrier is not responsible for such consequences, unless distinct notice is given at the time of the sending of the goods to be carried. If the plaintiffs had said, "Now there must be no mistake, the cotton must be delivered immediately; it is required for a mill which is actually at a stand for want of it, and if it is not delivered in due time you will be responsible for all the consequences;" probably the railway Company would not have taken it except at a high rate. Common carriers are bound to carry goods at a reasonable rate, but not to incur such a responsibility as would be imposed upon them if the direction of the judge in this case were correct. I think that the rule as to damages of this sort was correctly laid down in *Hadley v. Baxendale* (a), and that the judge did not follow it because he assumed that the whole loss arose entirely from the default of the defendants in not delivering the goods, whereas it arose partly from that and partly from the plaintiffs having no cotton to go on with.

BRAMWELL, B.—I am of the same opinion, though I think it likely that the same damages may be given if the case is again tried. The law on this subject is laid down correctly in *Hadley v. Baxendale* (a). To ascertain the damage, it is necessary to find out how much better off the plaintiffs would have been if the contract had not been broken. The plaintiffs are not necessarily entitled to recover the whole amount given. *Hadley v. Baxendale* (a) decides that a de-

(a) 9 Exch. 341.

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fendant is not liable, except for such damages "as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." I am not sure that another qualification might not be added which would be in favour of the plaintiffs in this case, *viz.* that in the course of the performance of the contract one party may give notice to the other of any particular consequences which will result from the breaking of the contract, and then have a right to say:—"If, after that notice, you persist in breaking the contract I shall claim the damages which will result from the breach." But in any case you must first find out the loss sustained by the plaintiff, and afterwards give it him minus any damages excluded by these rules. And I cannot but think that if the judge had left it to the jury to determine the damages in that way, they would probably have given the same sum which they have already given. But suppose it had appeared that cotton spinners usually keep a stock sufficient for a mill's consumption in hand; the inconvenience of the delay in delivering the cotton would be comparatively small. It may turn out that the plaintiffs ought not to receive more than that, because the damage which resulted is not such as in the usual course of things would result. Therefore we cannot say as a matter of law that the plaintiffs were entitled to recover the two sums in question. Mr. *Wheeler* contends that, on a fair construction of the summing up, the judge did not lay down as matter of law that the plaintiffs were entitled to those sums, but asked the jury what was the actual damage and detriment that the plaintiffs had sustained by reason of the non-delivery of the cotton. If the judge had said, as a proposition of fact, "I think



that you will consider that the plaintiffs are entitled to claim for wages," I doubt if there would have been any objection to the summing up. But he says, "Where, under circumstances such as exist in the present case, by the neglect of a carrier a manufacturer has no material to carry on his business, he has a *right* in my opinion to charge as *legal damage* such loss as naturally and immediately arose *from the stoppage of his mill*." He should have added, "If the jury are of opinion that the stoppage was the natural consequence of the non-delivery of the goods." I say this in order that the County Court judge may not suppose on the next trial that we think that these two sums are not recoverable; for I do not say so; and I do not understand that the other members of the Court think so.

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CHANNELL, B.—The rule as to the measure of damage was rightly laid down in the case of *Hadley v. Bazendale*. But it is contended that upon the facts of the present case it is distinguishable from *Hadley v. Bazendale*, and that the ruling of the judge is not inconsistent with the rule laid down by the Court in that case. Taking the whole of the summing up together, it appears to me that the County Court judge did direct the jury to consider the wages and the loss of profit as the measure of damages. As to the profit, he gave them an opportunity of correcting the plaintiffs' estimate of the amount, if they thought it erroneous. But he made them understand that, after setting right the amount of profit, they were to take the loss of profit and wages as the measure of damage. I think that was wrong. It cannot be said, as a matter of law, that these were damages which naturally flowed from the breach of the contract; or that any thing had passed to shew that they were in the contemplation of the parties when the contract was entered into.



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WILDE, B.— The plaintiffs' claim for damages is divided into four heads. The County Court judge told the jury to dismiss two of them from their consideration. As to the other two, the claim for loss of wages paid, and for anticipated profits, he told them that the plaintiffs had a right to charge as legal damage such loss as naturally and immediately arose from the stoppage of the mill. He then pointed out what was the "legal damage," intimating that it was for them to estimate the amount;—as to the wages, that the plaintiffs were entitled to the money they had actually paid, which was 7*l*.; as to the profits, that the jury were to estimate them, and having done so to give as damages, over and above the sum of 7*l*., such amount as, in their opinion, would be the actual loss and detriment that the plaintiffs had suffered, having previously pointed out that this was the loss resulting from the stoppage of the mill. The question is whether that is correct. According to the case of *Hadley v. Baxendale* the damage which, as a matter of law, must be considered as a measure of damages, is such as either arises naturally from the breach of contract, or such as both parties might reasonably have expected to result from a breach of the contract. It has been pointed out by the Lord Chief Baron that the stoppage of the mill was not a natural consequence of the non-arrival of the bales of cotton, but of the non-arrival of the bales and of the plaintiffs' having no cotton to go on with. Was it damage which the parties might reasonably expect? It would be, if it were the practice to work all the cotton mills in the neighbourhood from hand to mouth, and not the practice for mill owners to keep any stock of cotton in hand. We are pressed to say what is the rule as to damages. All I mean to say is that these claims are not the measure of damages. A judge cannot lay down that the plaintiffs, as a matter of law are entitled to them as the legal measure of damage. My



brother *Bramwell* has pointed out that, on a second trial, the jury may possibly give similar damages when the matter is submitted to them in a more general way. For my own part I think that, although an excellent attempt was made in *Hadley v. Baxendale* to lay down a rule on the subject, it will be found that the rule is not capable of meeting all cases; and when the matter comes to be further considered, it will probably turn out that there is no such thing as a rule, as to the legal measure of damages, applicable in all cases.

Order for new trial.

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*Gray* applied for costs.—As a general rule the costs of County Court appeals follow the event. [*Channell*, B.—Does that apply where the decision is that there must be a new trial on the ground of misdirection?] In *Alcock v. Delay* (a) the plaintiff obtained judgment in the County Court, and, the defendant having appealed, on the ground of the erroneous ruling of the County Court judge, the Court of Queen's Bench ordered a new trial, the costs of the first trial and of the appeal to be paid by the respondents. [*Bramwell*, B.—No additional costs have been incurred by the appellants in consequence of the respondents' appearance in this Court, because, whether the respondents appeared or not, the appellants must have appeared and asked for judgment.]

*POLLOCK*, C. B.—It is an inflexible rule of the Courts in Westminster Hall, that if a new trial is granted on the ground of misdirection no costs are given, because there is no fault in the parties, but the miscarriage takes place in

(a) 4 E. & B. 660.



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consequence of the error of the judge on a point of law. We think that precisely the same rule ought to apply in the case of appeals from County Courts, and that we should assimilate the practice to that which prevails with respect to the proceedings of higher tribunals. There will, therefore, be no costs.

BRAMWELL, B.—I think that when the act of one party has occasioned costs to the other, that other ought to get costs from him. Is that the case here? I think not; and therefore I agree that there must be no costs.

Nov. 14.

ELLIS, Appellant, KELLY, Respondent.

K., who was legally qualified as a surgeon and apothecary, and registered as such under "The Medical Act," 21 & 22 Vict. c. 90, was, before the time of passing of that Act, possessed of a German medical diploma, and called himself Dr. K. He continued to use that description after the passing of the Act, though not registered as doctor of medicine.—*Held*, no evi-

THIS was a case stated by two justices under the 20 & 21 Vict. c. 43. The information charged that the defendant H. Kelly did on the 2nd of November wilfully and falsely pretend to be, and did take and use the name or title of, a doctor of medicine, thereby implying that he was so registered under the 21 & 22 Vict. c. 90.

The defendant having appeared on a summons to answer the information, it was proved that the defendant had for years past, and on the day named in the information, a brass plate affixed to the outer gate of his residence, on which was the name "Dr. Kelly." The informant put in a published copy of "The Medical Register," in which the defendant's name appeared as "Kelly Hubert, Pinner, Middlesex, Mem. Royal College of Surgeons, England, 1856. Lic. Soc. Apoth. Lond. 1856," and further proved that the

defendant had wilfully and falsely pretended to be, or taken or used the name and title of a doctor of medicine so as to render him liable to a penalty under the 40th section of that Act. On an appeal, under the 20 & 21 Vict. c. 43, against the decision of justices dismissing the complaint, the appellant begins.



defendant had called himself "Dr. Kelly." There is no other Dr. Kelly at Pinner.

For the defence, a document purporting to be a diploma of the University of Erlangen, in Bavaria, was put in. A witness named Strauss proved that he was acquainted with diplomas of that University: that one of the seals attached to that produced was that of the Great University, and the other the seal of the Medical Faculty: that the diploma permitted the person therein named to practice medicine throughout Germany. He believed the signature of Professor Rosshuit attached to the diploma to be genuine, as he had received a letter from Professor Rosshuit, though he had never seen him write. Adolph Reinecker proved the seals of the University, and said that no one who was residing in England could obtain a medical diploma from a German University without examination.

The complainant contended that it was not legally proved that the diploma put in by the defendant was authentic and genuine, nor that the person named in it was the defendant: that even if these facts had been proved, the defendant, not being registered as qualified by that diploma to practice as a doctor of medicine, committed the offence charged by having the title "Doctor" on the brass plate in front of his house: that the possession of the foreign diploma did not entitle the defendant to use the title of "Doctor of Medicine," without being liable to a penalty.

The justices dismissed the information for the following reasons:—

"That it was proved that the defendant had practised in Pinner as a medical man, assuming the title of doctor of medicine; and that he was not registered in the Medical Register as a doctor of medicine. That the document purporting to be a diploma of the University of Erlangen was not proved. That the possession of that document so

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far justified the defendant in assuming the title of doctor of medicine that he could not be said to have assumed such title wilfully and falsely within the meaning of the Act."

The opinion of the Court is requested:—First, whether the 21 & 22 Vict. c. 90 prohibits the taking and using of the title of doctor of medicine by any medical man in England, unless the said title be duly registered according to the provisions of the Act.

Secondly, whether, if the Act does prohibit the assuming of such title, the defendant, under the circumstances, can be held to have so done wilfully and falsely within the meaning of the 40th section.

If the Court shall be of opinion in the negative, the judgment will be confirmed, &c.

*Codd*, for the appellant, claimed a right to begin.—He referred to *Jones*, app., *Taylor*, resp. (a).

*B. C. Robinson*.—The practice is for the respondent to begin: *The Liverpool Library v. The Mayor, &c., of Liverpool* (b).

BRAMWELL, B.—On an appeal against a conviction the respondent begins, because the onus lies on the party seeking to sustain the conviction; but this reason does not apply where the magistrates have dismissed the complaint. In such a case the party who appears in support of the complaint must begin.

*Codd*, in support of the appeal.—The preamble of "The Medical Act," 21 & 22 Vict. c. 90, recites, "that it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners." The de-

(a) 1 E. & E. 20.

(b) 5 H. & N. 526.



fendant's name did not appear as a doctor of medicine in "The Medical Register." The absence of his name from the copy produced is, by the 27th section of the Act, evidence that he was not registered under that Act. The justices found that the document put forward as a diploma was not proved; therefore they should have determined that the defendant was wilfully and falsely pretending to be, and using the title of a doctor of medicine, and consequently liable to the penalty imposed by the 40th section of the Act. [*Wilde, B.*—The magistrates seem to have considered that the defendant having in his possession a document, purporting to be a diploma from a German University constituting him a doctor of medicine, could not be said to have used the title wilfully and falsely. *Bramwell, B.*—How can it be said that the diploma was not proved? Two witnesses proved the seal of the University.] Even if the defendant were duly qualified, it is submitted that he is liable to a penalty if not registered. [*Pollock, C. B.*—He is registered as a surgeon and apothecary. If qualified and duly registered, may he not call himself what he pleases? Suppose he had been a doctor of laws and known as such, as Dr. Johnson was, would he have been liable to a penalty for using his original title? It is not stated that he practised as doctor of medicine.]—*Pedgrift, app., Chevallier, resp. (a), and Rex v. Barnard (b)* were referred to.

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*Robinson* appeared for the respondent, but was not called upon to argue.

*POLLOCK, C. B.*—The Act was probably intended to prevent any person from practising without being registered. The respondent is registered in respect of two qualifications, either of which gives him a right to practise. He is charged

(a) 8 C. B., N. S. 246.

(b) 7 C. &amp; P. 784.

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with falsely pretending to be a doctor of medicine; and he had been in the habit of calling himself "Dr. Kelly" for many years previous to the passing of the Act. The question is, whether he wilfully and falsely pretended to be so. I think there is no evidence of that.

BRAMWELL, B.—I do not think it has been shewn that any offence has been committed, whether the diploma is taken to be proved or not. The 32nd section contains a prohibition against persons not registered recovering their charges. The 40th section is intended to guard the public against being imposed upon by a person pretending to have a qualification when in fact he has none. It applies to the case of a person using a title falsely implying that he is registered or has a title to be registered. The object is to prevent people from assuming titles in respect of a qualification when they have none. It is contended that any person who wilfully and falsely calls himself a doctor of medicine, when not registered as such, is liable to the penalty though a member of the College of Surgeons and registered as such. But assuming that contention to be well founded, he is not liable, unless he does it *wilfully and falsely*. If the intention of the legislature had been to punish a person for incorrectly describing himself, the language would have been different. As it is, it points to wilful falsity. Then, did the respondent wilfully and falsely, in other words criminally, pretend to be, or use the title of a physician? There is nothing more than this, that having a foreign diploma he chose to put the word "Dr." before his name. I think that the magistrates took the right view of the case. They seem to have held that the respondent might well call himself "Dr. Kelly," on the supposition that he had a right to do so. I do not say that if he continues to use



that description after what has taken place he may not be responsible.

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CHANNELL, B.—On one of the two points that have been argued, I am of opinion that the appellant must fail. I think that the respondent has not wilfully and falsely used the title of “Dr.” As to the other point I give no opinion.

WILDE, B.—The only question is, what is the meaning of the words “wilfully and falsely” in the 40th section. I think that section refers to a case where a man wilfully pretends to be a doctor of medicine when he is not. The defendant had a German diploma, which he might reasonably believe entitled him to describe himself as he did. In a similar case, *Ladd v. Gould* (a), the Court of Queen’s Bench held that it was a question of fact for the magistrates whether the party used the particular description, knowing he was not entitled to it and with intent to deceive the public.

Appeal dismissed.

(a) Q. B. Hil. T. 1860.

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WRIGHT v. HALE.

Nov. 23.

THIS was an action of trespass, with a count in trover for converting the plaintiff’s goods.

The writ issued on the 15th of February, 1860. The cause was tried before *Bramwell*, B., on the 7th of November in this Term, and after the passing and coming into operation of the 23 & 24 Vict. c. 126 ; when a verdict was

The 23 & 24 Vict. c. 126, s. 34, which provides that when the plaintiff in any action for an alleged wrong recovers by the verdict of a jury less than 5*l.*, he

shall not be entitled to any costs, if the Judge certifies to deprive him of them, enables a Judge to certify in an action commenced before the passing of that Act.



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found for the plaintiff, with 40*s.* damages. The learned Judge immediately afterwards certified on the back of the record, that the action was not really brought to try a right beyond the mere right to recover damages, that the trespass or grievance, in respect of which the action was brought, was not wilful and malicious, and that the action was not fit to be brought.

A rule nisi to set aside the certificate having been obtained,

*Hawkins and Cave* now shewed cause.—The 23 & 24 Vict. c. 126, s. 34, enacts, that “when the plaintiff in any action for an alleged wrong in any of the superior Courts recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defendant any costs in respect of such verdict,” if the Judge certifies. The question is, whether this section applies to actions pending at the time of the passing of the Act. There is a distinction between statutes which interfere with vested rights and those which merely affect procedure. The only vested right which the plaintiff had in the present case was to bring his action. *Moon v. Durden* (a) may be relied on by the other side, but that decision proceeded on the ground that the plaintiff had a vested right of action to recover money due in pursuance of the terms of the wager. The same principle was applied in *Hitchcock v. Way* (b), which was an action by the bonâ fide holder against the acceptor of a bill of exchange given for a gaming consideration, in which issue was joined before the passing of the 5 & 6 Wm. 4, c. 41, but the trial took place after. In *Towler v. Chatterton* (c), it was held that the 9 Geo. 4, c. 14, which directs what evidence shall be required for proof of a promise

(a) 2 Exch. 22.

(b) 6 A. & E. 943.

(c) 6 Bing. 258.



to pay a debt barred by the Statute of Limitations, applied to the case of a promise made before the passing of that Act. In *Freeman v. Moyes* (a), the Court of Queen's Bench held that the 3 & 4 Wm. 4, c. 42, s. 31, made executors liable to costs in suits pending at the time of the passing the Act; and that decision was acted upon in *Pickup v. Wharton* (b) and *Grant v. Kemp* (c). *Charrington v. Meatheringham* (d) is an authority that a claim to treble costs under a statute existing at the commencement of a suit is not a vested right; and *Cox v. Thomason* (e) decided that a rule of Court introducing a new rule as to the taxation of costs applied to all taxations after the passing of the Act. It is a fallacy to say that, in giving effect to the certificate, the Court are giving to the statute a retrospective operation. If the learned Judge had no power to give the certificate, it is null and void and need not be set aside.

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*M. Chambers* and *Beasley*, in support of the rule.—It is a well known general principle that statutes shall not be held to operate retrospectively, unless they contain express words to that effect. They must be construed prospectively, unless the intention of the legislature to the contrary is unequivocally expressed. The rule is so stated by *Wilde*, C. J., in *Marsh v. Higgins* (f). "It is a rule and law of parliament that *Nova constitutio futuris formam imponere debet non præteritis*": 2 Inst. 292, Bac. Abr. Statute (C). In *Williams v. Smith* (g) and *Jackson v. Woolley* (h) it was held that the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97) could not be treated as having a retrospective operation. So it has been held that the 32nd section of the Com-

(a) 1 A. & E. 338.

(b) 2 C. & M. 401. 406.

(c) 2 C. & M. 636.

(d) 2 M. & W. 228.

(e) 2 C. & J. 498.

(f) 9 C. B. 551. 567. 568.

(g) 4 H. & N. 559.

(h) 8 E. & B. 778. 784.



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mon Law Procedure Act, 1854, which enacts that error may be brought on a special case, does not apply to judgments upon special cases stated before the passing of that Act: *Hughes v. Lumley (a)*. This is an instance of the application of the rule to an Act regulating procedure. [*Channell, B.*—Since the passing of that Act, error cannot be brought on a special case if it be agreed by the parties that there shall be no appeal. A case stated before the passing of the Common Law Procedure Act, 1854, may be supposed to have been stated subject to that condition.] In *Vansittart v. Taylor (b)* the Court of Exchequer Chamber held that the rule applied to the 34th section of the same Act, and therefore that no appeal was given in the case of a rule to enter a verdict, granted after the Act came into operation, on a point reserved at the trial before the Act received the Royal assent. [*Wilde, B.*—The leave to move is by consent, and it would have been unjust to treat the Act as altering the terms of the consent.]

POLLOCK, C. B.—I do not think that our decision will interfere with the great constitutional principle to which the plaintiff's counsel have referred. There is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in Courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts. If an act of parliament were to provide that in matters of mere opinion no more than three witnesses shall be called, after that no person would be entitled to call more than three witnesses on such points in any pending suit, because it would be a mere regulation of practice. Rules as to the costs to be awarded in an action are of that description, and are not matters in which there can be

(a) 4 E. &amp; B. 358.

(b) 4 E. &amp; B. 910.



vested rights. When an Act alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does apply to such actions. Here the plaintiff had an opportunity of discontinuing the suit. The Act passed on the 28th of August, and contains a provision that it should come into operation on the 10th of October. The 34th section enacts that where the plaintiff in any action for an alleged wrong in any of the Superior Courts recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover any costs if the Judge certifies to deprive him of costs. That is an act to be done at the trial, which was after the passing of the Act. I think, then, that we are not giving to the Act any retrospective operation, and the wrong supposed to be done by an *ex post facto* law does not arise. The rule must be discharged. It is satisfactory to think that, if we are wrong, our judgment can be reviewed, whereas if we had been of a different opinion there would have been no means of appealing against our decision.

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BRAMWELL, B.—I think that the certificate was properly given. I am struck by what has fallen from the Lord Chief Baron, that if the certificate be set aside the defendant would have no means of appealing from our decision, while, if the plaintiff is entitled to his costs notwithstanding the certificate, the judgment would be erroneous and he might still get them. I think that this reason alone ought to induce us to refuse to set aside the certificate if there were any doubt about its validity.

CHANNELL, B.—I agree that the rule should be discharged. In dealing with acts of parliament which have the effect of taking away rights of action, we ought not to



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construe them as having a retrospective operation, unless it appears clearly that such was the intention of the legislature; but the case is different where the Act merely regulates practice and procedure. If there had been no case which affected the present question, the inference from the language of the Act would have been clear: it points to an act to be done at the trial. I think, however, that the case is virtually concluded by the cases I refer to: *Freeman v. Moyes* (a), where *Littledale, J.*, at first doubted, but the decision was afterwards followed by all the Courts, and *Towler v. Chatterton* (b), where Lord *Tenterden's* Act, as to the evidence of a promise to bar the Statute of Limitations, was held to apply to all trials after the passing of the Act. These cases appear to me to be conclusive, but if there is any doubt I agree that the rule ought not to be made absolute.

WILDE, B.—I am prepared to decide this case upon principle. The rule applicable to cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. That this is the true principle sufficiently appears from the cases that have been referred to on both sides. The cases cited by Mr. *Chambers* are cases relating to rights, which were not affected; those referred to by Mr. *Hawkins* were cases relating to procedure. Enactments as to costs have been held by all the Courts to apply to actions commenced before the passing of the Acts in which they are contained. In *Cox v. Thomason* (c) it was held that a rule of Court relating to the taxation of costs,

(a) 1 A. &amp; E. 338.

(b) 6 Bing. 258.

(c) 2 C. &amp; J. 498.



which was general in its terms, applied to all taxations after the period when it came into operation, whether the action was commenced before or not. *Mr. Chambers* says that the enactment now in question takes away a right from the plaintiff. I do not agree with him. The right of the suitor is to bring an action and have it conducted according to the practice of the Court. Pending the action the procedure may be varied, but his right is to have his action conducted according to the existing course of procedure, whatever that may be.

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Rule discharged.

ROBERT GRAVES IBBETT v. DE LA SALLE.

Nov. 26.

**T**HIS was an action in the Mayor's Court.—Declaration: that whereas, heretofore, to wit, on &c., at the parish &c., and within the jurisdiction of this Court, in consideration that the plaintiff, at the request of the defendant, would by himself or his agent seize and distrain the goods then on the premises of one Galvin, situate &c., for the sum of 9*l*., being the arrears of rent alleged by the defendant to be due to him for the same at Christmas Day then last, the defendant then and there, within the jurisdiction, promised the plaintiff to indemnify him against all costs and charges in respect of any law expenses, action or actions, that might arise or be brought against the plaintiff or his agent, by reason or in consequence of the said distress; and against all indemnification against all costs and charges in respect to any law expenses, action or actions that may arise, as well as any other and all charges or expenses which you or your agent may be at or brought against you or your agent on this account." W. H., the servant of R. I., having distrained, an action of trover was brought against him by the tenant for the conversion of certain goods, some of which were alleged not to have been in the inventory, in which action the plaintiff was nonsuited.—*Held*, that, assuming that W. H. had done nothing wrong, the indemnity extended to the costs of defending the action brought against him.

A landlord signed a warrant of distress in the following form:—"I hereby authorise R. I., or his agent, as my agent, to seize and distrain the goods on the premises, now in the possession of M. G., for 9*l*., being the amount of rent due to me; and for your so doing this shall be your sufficient warrant, authority and



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other charges and expenses, action or actions, that might arise or be brought against the plaintiff or his agent, by reason or in consequence of the said distress; and against all other charges and expenses which the plaintiff or his agent might be at on the said account.—Averment: that the plaintiff did, by W. H. Ibbett, his agent, seize and distrain, &c.; that in consequence of the distress an action was then and there, and within the jurisdiction, brought by Galvin against W. H. Ibbett, as and being the agent of the plaintiff; and the plaintiff thereby, then and there and within the jurisdiction, incurred and became liable to pay certain costs, to wit 100*l*., and was and is damnified to the amount thereof; whereof the defendant, then and there and within the jurisdiction, had notice; yet the defendant did not nor would indemnify the plaintiff against the said costs, charges and law expenses, and neglected and refused so to do, &c.

Plea.—Non assumpsit.

At the trial, it appeared that the defendant being the owner of a house, No. 33, Jewin Street, gave to the plaintiff a warrant to distrain, which was as follows:—

“Warrant to Distrain.

“Know all men by these presents. I do hereby authorize R. G. Ibbett, or his agent, as my agent, to seize and distrain the goods and chattels on the premises, now in the possession of Mr. Galvin, situate &c., for the sum 9*l*. 5*s*., being the amount of rent due to me for the same on Christmas Day last; and for your so doing this shall be your sufficient warrant, authority and indemnification against all costs and charges in respect to any law expenses, action or actions that may arise, as well as any other and all charges or expenses which you or your agent may be at, or brought against you or your agent on this account; nor do I hold you responsible for any goods or chattels clandestinely



removed from the said premises; and I hereby agree to allow you five per cent. on the amount levied for.

"As witness my hand this 5th day of March, 1859.

"J. T. De La Salle."

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The distress was made by W. H. Ibbett, the son of the plaintiff, and the goods were subsequently appraised and sold. An action of trover was commenced by Galvin against W. H. Ibbett for the alleged conversion of certain goods; and it appeared from the attorney's letter that it was charged against him that he had disposed of certain goods beyond those in the inventory; that he had not sold some of those in the inventory, and had not returned to Galvin such goods as remained unsold. At the trial of that action Galvin failed to make out his case and was nonsuited. The bill of costs for defending this action amounted to 9*l.* 16*s.* 8*d.* This the plaintiff had paid, but he had not received the amount from Galvin. Upon these facts the learned Judge who tried the cause, being of opinion that the indemnity did not extend to these costs, nonsuited the plaintiff, giving him leave to move to enter a verdict.

*Joyce* having obtained a rule to set aside the nonsuit and for a new trial, upon the ground that the evidence given and facts admitted disclosed a good cause of action,

*Philbrick* now shewed cause.—The action by Galvin against W. H. Ibbett was for selling goods other than those comprised in the inventory. Now, although it may be true that the defendant is bound to indemnify the plaintiff against all actions brought on account of any act done in the conduct of the distress, the indemnity does not apply to a case where the action is brought for alleged illegal acts done by the broker's man distinct from the distress. In *Draper v. Thompson* (a), which was an action on a similar indemnity, *Tindal*, C. J., said:—"It never could be intended

(a) 4 C. & P. 84.



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that the defendant was to indemnify the plaintiff against the acts of his own servants, and I am of opinion that it (the indemnity) only applies to cases where a distress was illegal, because the landlord had no right to put in such distress." The case resembles in principle *Dudley v. Folliot (a)*, when it was held that a covenant in a conveyance of lands that the grantee might peaceably enjoy without interruption of the grantor and his heirs, or of any other person, does not extend to the acts of wrong doers, but only of persons claiming by a legal title. The indemnity extends to all acts complained of, as the wrongful acts of the landlord alone or of the landlord and broker. It could not be contended that it was an indemnity to the broker against an unfounded charge of assault. It was only intended to extend to those acts which the broker was bonâ fide entitled to do in exercise of the authority to distrain. [*Pollock, C. B.*—The effect of the indemnity is, "If you take my place in doing this act I will indemnify you against all costs you may incur, provided that what you do is not illegal on your part." Here the broker is charged with doing something which, in point of fact, he did not do. As to the case of a charge of assault, that is simply a personal charge and wholly beside the distress, and therefore quite different from a charge of doing something wrong with respect to the distress.] Secondly, the plaintiff was not bound to pay the costs of the action of *Galvin v. W. H. Ibbett*, and therefore he was not legally damned.

*Kenealy*, in support of the rule.—*Toplis v. Grane (b)* is an authority that when an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, if such act is not apparently illegal in itself, but is done honestly and bonâ fide in compliance with the defendant's

(a) 3 T. R. 584.

(b) 5 Bing. N. C. 636; S. C. 7 Scott, 620.



directions, he shall be bound to indemnify the plaintiff against the consequences thereof. The plaintiff was therefore bound to indemnify his agent, W. H. Ibbett. In *Toplis v. Grane* the act of the broker was a wrongful act. Here the plaintiff's agent did no wrong. All that can be said is that, while executing the warrant of distress properly, he was charged with having done wrong.

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POLLOCK, C. B.—We are all of opinion that there must be a new trial; and we think that we ought not to send down the case for that purpose without some direction as to the law applicable to the facts. The action appears to have been brought against the broker merely because he was the instrument by means of which the landlord made the distress. It does not appear that he had done anything wrong. The landlord intended to say, "I appoint you as my agent; if you are put to any costs in consequence of acting for me, I agree to indemnify you." According to all that we know of it, this was a vexatious and groundless action against the broker, and therefore within the indemnity. The indemnity does not extend to misconduct on the part of the broker, such as an assault, or seizing goods which he has no right to take, but merely to matters properly arising out of the distress.

BRAMWELL, B.—The case ought to go down to a new trial if we see that the Judge was wrong in nonsuiting the plaintiff. I have some difficulty in construing this indemnity. I think Mr. *Philbrick's* argument is intelligible and clear; and I am by no means sure that it is not well founded. It may be that the defendant says, "I give you authority to distrain; and, so far as that authority extends, I agree to indemnify you." It may mean, "If it should turn out that I have no title to distrain, I indemnify you."



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If the broker had done wrong, we should probably hold him not entitled to recover upon this indemnity. The indemnity may extend to rightful acts done by the broker in the course of his duty, but for which he may be subjected to an action by the tenant. Again, the construction may be, "I will not be responsible for what is charged as your wrongful act; but I indemnify you against what is said to be my wrongful act." The words are, "And for so doing, this shall be your sufficient warrant, authority and indemnification." The authority and indemnification are thus coupled together. I cannot say that I have a clear opinion upon the construction of this document.

CHANNELL, B.—I think that there ought to be a new trial. The nonsuit proceeded upon the ground that the claim of the plaintiff to be indemnified was not made out. I agree with the view of the Court of Common Pleas in *Toplis v. Crane* (a). A broker employed to make a distress may refuse to do so if he think fit. He may say, "I know that the tenant is so obstinate that I will not distrain unless I am indemnified against the consequences of all proceedings that may be taken against me." Here the distress appears to have been regular; and, that being so, the broker has a right to be indemnified. If he had been guilty of any misconduct, he could not have maintained an action to recover damages the result of his own misconduct or default.

WILDE, B.—Having read the indemnity, I think it was intended to apply to all actions to which the broker might be subjected, except for the actual misconduct or default of himself or his servants.

Rule absolute.

(a) 5 Bing. N. C. 636.



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## LAVERY v. TURLEY.

Nov. 5.

**D**EBT, for goods sold &c.

Plea (inter alia), upon equitable grounds.—That after the accruing of the causes of action the defendant was in possession of a public house and stock in trade, and thereupon it was agreed that in consideration that the defendant, at the request of the plaintiff, would quit the said public house and premises, and deliver up possession of the same and the stock in trade to the plaintiff, the plaintiff would pay to the defendant the sum of 100*l.* and give up and discharge and exonerate the defendant from all debts and claims and causes of action in respect of the causes of action in the declaration mentioned. That the plaintiff in pursuance of the agreement paid the 100*l.*, and the defendant then quitted the house and gave up possession of the stock.

Issue thereon.

At the trial before *Wilde*, B., at the last Summer Assizes at Liverpool, the facts stated in the plea were proved by the evidence of the witnesses for the defence; but the agreement did not appear to have been reduced to writing. The jury found a verdict for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him if the agreement relied upon by the defendant ought to have been in writing.

*S. Temple* now moved to enter the verdict accordingly. —The agreement was a contract for an interest in or concerning land, and therefore one which by the 29 Car. 2, c. 3, s. 4, is required to be in writing: *Smart v. Harding* (a).

(a) 15 C. B. 652.

To an action for goods sold the defendant pleaded, that he was possessed of a public house, and it was agreed that, in consideration that the defendant would give up possession of the same, the plaintiff would pay the defendant 100*l.*, and discharge the defendant from the debt; that the plaintiff paid the 100*l.*, and the defendant quitted the house. The agreement was not in writing. —*Held*, that, having been executed, it was receivable as evidence to prove the plea. *Semble*, that the plea, though pleaded as an equitable defence, was a good plea at common law, by way of accord and satisfaction.



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POLLOCK, C. B.—We are all of opinion that there ought to be no rule. The objection is that the agreement is one which, by the Statute of Frauds, is required to be in writing; and that would be so if it were sought to enforce it as an agreement. But it is pleaded as a fact that the defendant performed the agreement, and the plaintiff accepted such performance in satisfaction. The objection that the agreement was not in writing is got rid of. The 4th section of the Statute of Frauds does not exclude unwritten proof in the case of executed contracts. A familiar instance is that of letting land for a period longer than three years, where, if the premises have been occupied, evidence may be given of the terms of the holding.

BRAMWELL, B.—I am of the same opinion. I think the plea is a good plea at common law.

CHANNELL, B.—I think there is an accord and satisfaction, and the defence might have been so pleaded. This case is distinguishable from *Smart v. Harding* (a), because in that case there was no right of action unless the contract was proved.

WILDE, B. concurred.

Rule refused.

(a) 15 C. B. 652.





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## BAYLEY v. THE WOLVERHAMPTON WATERWORKS COMPANY. Nov. 5.

**DECLARATION.**—That the defendants [were possessed of and] wrongfully, negligently and carelessly kept and maintained a water plug or fire plug in a certain highway unprotected, and without any cover or lid or stop thereto over the hollow thereof, and in an insufficient and insecure state, so as to be, and the same then was, dangerous and likely to cause injury to horses lawfully passing in and along and using the said highway, by reason whereof a horse of the plaintiff, which he was lawfully driving along the highway, put one of his feet therein, and the foot became fastened therein, and the horse in endeavouring to release itself was injured, &c.


Pleas.—First: Not guilty. Secondly.—That the defendants were not possessed of the plug as alleged.—Whereupon issues were joined.

At the trial, before *Byles, J.*, at the last Staffordshire Summer Assizes the plaintiff proved that in February 1860, as he was driving a horse and cart through Bilston Street in the town of Wolverhampton, his horse got its foot in a plug hole, whereby the hoof was seriously injured and the horse was rendered useless. It was further proved that the cap of the plug had been broken for a considerable time. The plug was used for the purpose of watering the roads. The defendants were incorporated in 1855, and in

By the 8 & 9 Vict. c. cxxxv., s. 53, the Wolverhampton Waterworks Company, at the request of the Commissioners under an Act for improving the town, were required to fix proper fire plugs in the main and other pipes belonging to the Company. By the 54th section, "the Company shall, at the cost and charges of the said Commissioners, from time to time, repair, renew and keep in proper order every such fire plug." By the 55th section, "the costs of such fire plugs and the expense of fixing, placing and maintaining the same in repair shall be defrayed by the Commissioners."

The Company having put down plugs in the streets the Commissioners paid for them; and by the 54 Geo. 3. c. cvi., and subsequent Acts the plugs became the property of the Local Board of Health. A horse was injured by getting its foot into one of the plugs, the cap of which was broken.—*Held*, that the Company and not the local Board was liable to an action for the neglect to repair.




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1856 had purchased the works and plant of a former Company, which had been incorporated in 1845. The plug in question had been put down by the old Company in 1846. At that time an Act (54 Geo. 3, c. cvi.) "for improving the town of Wolverhampton, in the county of Stafford, and for removing and regulating the markets in the said town," was in force, by which certain Commissioners were appointed for the purpose of putting the Act into execution; and by the 14th section it was enacted, that "the property of and in the several streets, &c., within the said town of Wolverhampton, &c., and all materials, implements and other things thereto belonging, or which shall be purchased or provided by virtue or for the purposes of this Act, shall belong to and be the property of and are hereby vested in the said Commissioners." By "The Wolverhampton Waterworks Act, 1845" (8 & 9 Vict. c. cxxxv.), the Wolverhampton Waterworks Company was incorporated, and by the 53rd section it was enacted, "That the Company, at the request of the Commissioners acting under the 54 Geo. 3, c. cvi., shall and they are hereby required to fix proper fire plugs into the main and other pipes belonging to the Company, &c., at such places as may be considered most proper and necessary for the supply of water in extinguishing fire." By the 54th section, "the Company shall at the cost and charges of the said Commissioners, &c., from time to time repair, renew, and keep in proper order every such fire plug; and as soon as any such fire plug shall have been completed, the said Company shall deposit a key thereof at each place within the limits of this Act, where any public fire engine shall be kept," &c. By the 55th section, "the cost of such fire plugs and the expense of fixing, placing, and maintaining the same in repair, and of providing such keys as aforesaid, &c., shall be defrayed by the Commissioners."



The Commissioners paid to the Company 7*l.* each for the pipes and plugs put down. In 1847, the town of Wolverhampton obtained a charter of incorporation, which was confirmed by the 11 & 12 Vict. c. 98, and the whole of the powers vested in the town Commissioners by their special Act were transferred to the corporation. By the 13 & 14 Vict. c. 90, a provisional order for the application of "The Public Health Act, 1848" (11 & 12 Vict. c. 63), was confirmed, and by the provisional order so confirmed the mayor, aldermen, and burgesses of the borough of Wolverhampton, by the council of the said borough, were constituted the local Board of Health for the borough (*a*). By the 68th section of "The Public Health Act, 1848," the streets "and the pavements, stones and other materials thereof, and all buildings, implements and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the local Board of Health." By "The Wolverhampton Improvement Act, 1853" (16 Vict. c. xxviii.), the 54 Geo. 3, c. cvi., was repealed; and by section 10 it was enacted, "that notwithstanding the repeal of that Act, the corporation and local Board respectively shall by virtue of this Act be and remain seised and possessed of and entitled to all the buildings, &c., property, effects, &c., to which the corporation or the local Board are respectively by virtue of that Act, and for any of the purposes of that Act," entitled. By the 18 & 19 Vict. c. cli., which embodies in it the Waterworks Clauses Act, (10 & 11 Vict. c. 17), in 1855, the defendants were incorporated. In 1856, under the 19 & 20 Vict. c. lvii., they obtained a transfer of the old Wolverhampton Waterworks, and took possession thereof. The 16th section of the last men-

(*a*) The copy of this order is given at length in Schedule (I.) of the 16 Vict. c. xxviii.

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tioned Act enacts that "the new Company shall be subject to and perform all duties, obligations, and liabilities to which the old Company" were subject. It was proved that the Company was in the habit of keeping the plugs in repair, but that they did not repair until after notice by the local Board.

Upon these facts, it was objected that the defendants were not possessed of the plug, and that the action should have been brought against the local Board of Health and not against the defendants. The learned Judge ordered the declaration to be amended by striking out the allegation that the defendants were possessed of the plug; and a verdict was found for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them, if the Court should be of opinion that the action should have been brought against the local Board.

Phipson now moved accordingly.—The property in the plug was vested in the Commissioners, who are now represented by the local Board of Health. By the 54th section of the 8 & 9 Vict. c. cxxxv., the Company are to repair at the cost and charge of the Commissioners, that is at their request. It was not shewn that the local Board had requested the Company to repair. The repairing is a duty as between the defendants and the local Board, not as between the defendants and the public. It is merely to keep the plugs in repair as fire plugs capable of supplying water. The plugs were the property of the local Board, in their possession, and used by them for their own purposes.

POLLOCK, C. B.—The 54th section of "The Wolverhampton Waterworks Act, 1845," casts on the defendants the burden of repairing, renewing and keeping the fire plugs in proper order, though not at their own expense. Therefore I am of opinion that the defendants are responsible.

BRAMWELL, B.—I understand that it is admitted that an action lies either against the local Board or the Company. But the local Board would say, "We have no right to repair the plugs though we pay for the repairs." Mr. *Phipson*, for the defendants, would contend that the property in the plugs is in the local Board, and that if the defendants made default in repairing, they might do the repairs themselves. The only doubt in my mind was, whether, as the property in the plugs is in the Commissioners, they are not responsible for their condition. But I think that the Act creates a duty as between the defendants and the public.

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CHANNELL, B.—I am of the same opinion. It is conceded that the plaintiff has a right to maintain an action against somebody, either the local Board or the Company. Now the duty of keeping the fire plugs in repair is cast by the Act upon the defendants. They have a right of direct and immediate interference with the plugs so far as regards repairing, renewing and keeping them in order.

WILDE, B., concurred.

Rule refused.

FANNY DAVIS v. BOMFORD.

Nov. 5.

DECLARATION.—That the plaintiff and the defendant agreed to marry one another, and a reasonable time for such marriage had elapsed; that the plaintiff had always been ready and willing to marry the defendant until the

In an action for breach of promise of marriage, it was proved that the defendant, having written a

letter to the plaintiff desiring to terminate the engagement, called at her father's house, and a conversation took place respecting the return of letters. The defendant returned the plaintiff's letters; the plaintiff said "No, I can't give up your letters it would be like giving you up altogether." The plaintiff left her home and went to reside with an aunt for a long period, and no correspondence took place between the parties for a period of two years.—*Held*, that this was evidence from which the jury might infer that the plaintiff had exonerated the defendant from his promise before any breach.

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defendant married another woman ; yet the defendant made default, and married another woman.

Plea.—That, after the agreement and before breach, the defendant exonerated and discharged the defendant from the agreement and the performance thereof.

At the trial, before *Hill, J.*, at the last Worcester Assizes, it was proved that in 1857 the defendant was in the habit of visiting the house of the plaintiff's father at Worcester as an accepted suitor. In the month of September of that year the defendant wrote to the plaintiff stating his desire to put an end to the engagement. He called at the house of the plaintiff, and in the presence of her brother a conversation took place as to returning letters. The defendant returned the plaintiff's letters, and requested the plaintiff to give back his letters to her. The plaintiff said: "No, Tom ; I can't give up the letters, it would be like giving you up altogether." The plaintiff left Worcester and went to stay with an aunt in London, where she remained until after the defendant's marriage. The action was commenced in March 1860. No explanation of the delay was given.

The learned Judge asked the jury whether they thought that before any breach the plaintiff and the defendant had agreed to absolve each other from the promise, and observed strongly upon the delay in bringing the action. The jury found a verdict for the defendant.

Pigott, Serjt., now moved for a new trial, on the ground of misdirection and that the verdict was against evidence. The evidence shewed that the defendant had repudiated his contract. [*Channell, B.*—The plaintiff received back the defendant's letters. *Wilde, B.*—The defendant asks to be exonerated. May not the jury have thought that by her conduct the defendant acceded to it? *Pollock, C. B.*—

A promise of this sort is subject to certain implied exceptions, as, "If I am alive," "If I am in health;" and it is a thing to be performed promptly and speedily. If an interval longer than that over which persons usually allow the contract to extend is permitted to pass without any intercourse or correspondence between the parties, the contract may be presumed to have been abandoned. *Bramwell, B.*—If the defendant had said, "I will not marry you," the plaintiff's going away would not lead to the inference that she exonerated him from his promise; but here he asked to be exonerated.] The plaintiff did not give up the engagement when the defendant asked for his letters, and from her subsequent silence no intent to exonerate him can be inferred. [*Wilde, B.*—Is not that a question for the jury?]

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POLLOCK, C. B.—The learned Judge who tried the cause reports that he is satisfied with the verdict, and that the only question is, whether there was evidence for the jury upon the plea. In the majority of actions for breaches of promises to marry, as the parties cannot be witnesses the whole contract is a matter of vague surmise. Most people would infer, if one party went to one place and the other to another, and no communication took place between them for a considerable time, that the engagement was given up and that each was free. I think that the question was properly left to the jury, and that they came to a right conclusion.

BRAMWELL, B.—I am of the same opinion. As to the question whether the verdict was against evidence, the learned Judge is satisfied with it, and I concur in thinking that there was evidence, and satisfactory evidence, in support of the plea. The defendant expressed a disinclination to go on with the engagement and desired to be released

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from it. The presumption is that, upon that, both parties would give it up. Though the plaintiff might feel regret, it is improbable that she would wish to insist on marrying the defendant. My brother *Pigott* says that the plaintiff did not give up the defendant at the time of his communication, and that mere silence afterwards was not exoneration. I think he is wrong. This is not a silence which would be equally consistent with her treating the promise as subsisting. She went away and did not ask the defendant if he meant to carry out his engagement. Suppose the plaintiff hoped that the defendant at some future time might voluntarily marry her, and therefore did not wish to give him up; and the defendant at the end of two years had called on the plaintiff to marry her and she had said, "Two years ago we gave each other up;" surely a jury would say that the discontinuance of the correspondence justified her in doing so.

CHANNELL, B.—I agree that there ought to be no rule. My brother *Pigott* says that there was no evidence to support the plea. I do not attach much importance to the retention of the letters. It is clear that there was no promise after the day when the defendant's letters were given up. From the expressive silence and the plaintiff's change of residence, I should infer that there had been a mutual exoneration.

WILDE, B.—I rest my judgment on the narrow ground, that the promise, in an action of this kind, where the parties themselves cannot be called, is usually proved by their conduct. Then the question is, whether the conduct of the parties was such that the jury might infer from it a rescission of the contract. A conversation leading to such a result was proved, after which the parties

ceased to see or communicate with each other, or do that which they would naturally or ordinarily do if the promise had continued to subsist. Without saying that I should have found the same verdict, the question was one for the jury, and they have decided it: therefore there will be no rule.

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POLLOCK, C. B., added.—In *Lowe v. Peers* (a), Lord Mansfield said:—"When persons of different sexes attached to each other, and thus contracting to marry each other, do not marry immediately, there is always some reason or other against it, as disapprobation of friends and relations, inequality of circumstances or the like. Both sides ought to *continue free*; otherwise such contracts may be greatly abused, as by putting women's virtue in danger by too much confidence in men, or by young men living with women without being married. Therefore these contracts are *not* to be *extended* by implication." It is clear that he thought that such contracts if not speedily carried into effect might be considered as abandoned.

Rule refused.

(a) 4 Burr. 2225. 2230.

MICHAELMAS VACATION, 24 VICT.

IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

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Dec. 1.

HIPKINS v. THE BIRMINGHAM AND STAFFORDSHIRE GAS
LIGHT COMPANY.

The 6 Geo. 4, c. lxxix., incorporated a Company for the purpose of supplying the town of Birmingham with gas. By the 8 & 9 Vict. c. lxvi., s. 160, it is enacted, "That if the Company shall at any time cause or suffer to be conveyed or to flow into any stream, reservoir, aqueduct,

THIS was a proceeding in error on the judgment of the Court of Exchequer for the plaintiff on a special case stated for the opinion of that Court. The pleadings and special case fully appear in the report, 5 H. & N. 74.

pond or place for water, within the limits of the said Act, any washing, substance or thing which shall be produced by making or supplying gas," they shall forfeit 200*l*. In 1854 the Company erected a gas tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the Company, and the tank was erected on solid sandstone and with proper materials. The Company knew that mines in the neighbourhood had been worked, but they did not know that mines had been worked under or near to any part of their land. In 1838 there were workings under half the Company's land, and from 1848 to 1855 these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water in it unfit for domestic purposes.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the Company had suffered the washings to flow into the plaintiff's well within the meaning of the 8 & 9 Vict. c. lxvi., and consequently were liable to the penalty of 200*l*.

Sir *F. Kelly* (with whom was *Whateley* and *Phipson*), argued for the defendants (*a*).—The land on which the works were erected was selected by an experienced mining engineer; and the tank was constructed with proper materials and with due care. The plaintiff must contend, that if an earthquake or any other convulsion of nature had

(*a*) Before *Cockburn*, C. J., *Wightman*, J., *Williams*, J., *Hill*, J., *Keating*, J., and *Blackburn*, J.

destroyed the tank, and caused the washing to flow into his well, the defendants would be liable. Or suppose a trespasser had entered in the night time and bored a number of holes in the tank, whereby the plaintiff's water was contaminated, could he maintain an action against the Company? [*Cockburn*, C. J.—My doubt is whether there is any default in the Company unless they have had an opportunity, that is a reasonable time, to repair. It occurred to me whether that was not an element in the case which has hitherto been overlooked.] It is conceded that, by the 162nd section of the 8 & 9 Vict. c. lxvi., the Company are liable to a penalty of 20*l.* for each day the fouling shall continue after twenty-four hours' notice of it; but under the 160th section they are not liable unless they have "caused or suffered" the fouling. [*Cockburn*, C. J.—Can a person be said "to suffer" what he cannot prevent?] The damage has arisen from the act of a person over whom the Company had no controul; and if they are liable in this action they are insurers against such an event however caused. The flow of the washing from the tank was caused by the cracking of its walls, and that again was caused by the working of the mines. The Company have a common law right to the support of the mines, but they have no power to prevent the owner from working them, nor any means of ascertaining the effect of the working. The word "suffer" should receive its ordinary construction, and its meaning is "to allow that which a person has it in his power to prevent." [*Wightman*, J.—Suppose the water had been contaminated by gas, under the 165th section the Company would have been liable to a penalty of 20*l.* without any default or negligence on their part.] That clause has been inserted in order to relieve the party injured from proving actual negligence. If a gas pipe, which passed through a person's land, burst, and thereby the gas con-

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taminated his water, the Company might be liable under that clause, although no reasonable diligence or attention could have prevented the mischief. But under the 160th section the injury must have been caused by something which the Company might have prevented and failed to prevent. If the plaintiff's construction of the word "suffer" prevails, the Company might be liable although they used their utmost endeavour to prevent; for instance, if rioters had broken into the Company's premises and demolished the tank, notwithstanding the Company struggled to prevent it. [*Cockburn, C. J.*—The Company selected the spot over the mines on which they built their works, and they accumulated a quantity of foul water which found its way to the plaintiff's well; therefore they are the immediate cause of the injury. It was incumbent upon them to construct their works with greater care and skill than would be required if there were no mines under them.] If the legislature had intended to make the Company insurers against contamination caused by the wrongful act of any person, they would not have called it an "offence."—He referred to *Harris v. Ryding* (a), *Humphries v. Brogden* (b), and *Fletcher v. The Great Western Railway Company* (c).

The Court intimated their wish to hear the argument for the plaintiff on the first count.

Scotland (*Macnamara* with him), for the plaintiff.—There is nothing unreasonable in these provisions, and the legislature has inserted them for the protection of persons in the neighbourhood from injury by works of this description. The act of parliament does not impose upon the Company the obligation of erecting their works on any particular spot, and at the time they purchased the land

(a) 5 M. & W. 60.

(b) 12 Q. B. 739.

(c) 4 H. & N. 242.

on which the tank was built mining operations were going on under it. The Company had the means of knowing that, and ought to have chosen a different site. It is for them to shew that they have taken every possible means to prevent damage to any one from their works. This they have not done. The case only finds that they have taken every precaution with reference to an ordinary state of things. They might have obtained power to purchase the mines. The Company are receiving a great benefit from their act of parliament, which is in the nature of a contract between them and the legislature acting on behalf of the public. The tank might have been constructed on an embankment of cast iron, so that a crack in the surface land would not affect the tank. The case finds that the surface soil of lands in the neighbourhood of mines, without any superincumbent weight, is frequently cracked by the subsidence or the lateral sinking of the earth, by the giving way of the ribs and pillars of coal which are left in the mines, when the coals are worked, to support the surface. That leads to the inference that the first working of the mines might have caused a subsidence, though the second working had never taken place. There is nothing unreasonable in construing the 160th section as meaning that the Company shall be responsible as insurers against injury to the neighbourhood from their works. The legislature has granted them a monopoly in the supply of gas to the neighbourhood, and has enabled them to divide great profits. [*Cockburn*, C. J.—Is this a contract for an absolute guarantee, or merely that the Company shall be liable if they do not prevent?] The words “suffer to flow” mean “allow to flow.” [*Cockburn*, C. J.—Suppose the Act used the word “allow,” does a person “allow” if he neither has the means, the power, nor the opportunity of preventing?] It is not necessary to contend that the Com-

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pany would be liable if the injury was occasioned by vis major, because their responsibility arises from their contract. The not taking extraordinary care is, in effect, "to suffer." The word "negligently" would have been introduced if the legislature intended to limit the liability to ordinary neglect. The term "offence" does not necessarily imply a criminal act: *King v. Burrell* (a): here it is used in the sense of offensive act. The words in the 160th section, "or shall do any act to the water whereby it shall be fouled," apply to acts knowingly and intentionally done. By the 161st section the penalty shall be recovered "by the person into whose water such washing, substance, or thing shall be conveyed *or shall flow*, or whose water shall be fouled or corrupted thereby." That is an exposition of the previous section. By the 162nd section the Company are liable to an additional penalty of 20*l.* "for each day such washing, &c. shall be conveyed or shall flow as aforesaid" &c. after twenty-four hours' notice. The 163rd section supports the construction contended for. There the legislature, in imposing a penalty for the escape of gas, makes knowledge of it a necessary element in the offence. The 165th and 166th sections, the object of which is to prevent the contamination of water by gas, contain substantially the same provisions as the 160th and 162nd. As regards liability, there is a wide distinction between officers acting in discharge of a public duty and a Company carrying on an offensive trade for their own profit. In the latter case, the employment of skilled persons will not protect them if they have not taken proper precautions against injury.—He referred to *Scott v. The Mayor, &c. of Manchester* (b).

Phipson replied.

(a) 12 A. & E. 460.

(b) 2 H. & N. 204.

COCKBURN, C. J.—We are all of opinion that our judgment must be for the plaintiff. At first I entertained some doubt upon the main question for our decision, viz. whether the Company are responsible at all events and under all circumstances, having undertaken to guarantee against all possible contamination of the water in the neighbourhood. The doubt in my mind was as to the construction of the 160th section of the Act—whether an individual or a corporation can be said to “suffer” a thing to be done, when they have taken every care to prevent it, or until an opportunity has been afforded them to repair the injury. I desire not to be considered as deciding that point affirmatively; and if it were necessary I should require further time for consideration. The decision of the case does not necessarily depend upon it, and my judgment proceeds on the ground urged by Mr. *Scotland* in his able argument, that the Company have not exonerated themselves from negligence, and that the fact of the plaintiff’s water having received contamination makes them *prima facie* liable. If there was negligence on the part of the Company, they may be presumed to have *suffered* the act which by due and proper care they might have prevented. All that they say is, that they have constructed their works with due and proper care and security, with reference to ordinary circumstances. But here the circumstances are not ordinary, but extraordinary. The works were constructed on a spot where the ground, to a considerable extent, had been excavated; and, upon the facts stated, it does not appear that they might not have constructed their tank in a different position, or that they might not, by constructing the tank of different materials or by other mechanical means, have prevented the mischief. I think, therefore, that the Company have failed to shew that they are exempt from liability. The injury having proceeded immediately

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from their works, the onus was on them to get rid of the presumption of negligence; and, not having done so, they may be properly said to have "suffered" this evil to take place. That being so, it is not necessary to say anything upon the second question.

WIGHTMAN, J.—I am of the same opinion. From the terms used in the 160th section, I think that the object of the legislature was to make the Company insurers at all events against any contamination of the water in the neighbourhood by the access to it of the residuum of their gas works. It seems to me very reasonable that those who bring into a neighbourhood such works as are likely to be injurious (and it is clear that the escape of gas may have the effect of contaminating one of the first necessities of life), should be bound by the conditions upon which they obtained their act of parliament. In my opinion, the Act imposes on them the duty of taking care at all events that the public shall not suffer. The words of the 160th section are consistent with that view of the case—"if the Company shall at any time cause or *suffer* to be conveyed or *to flow* into any stream &c. any washing, substance or thing which shall be produced in making or supplying gas" &c. It is said to be a great hardship to charge the Company with a penalty of 200*l.* without any neglect or default on their part; but it may be that the legislature considered that, if the Company had such a stringent rule imposed upon them, it would have the effect of causing them to exercise more caution in choosing the place where they constructed their works. Then the 165th section says that, if any water is contaminated by the gas of the Company, they shall forfeit for every such offence 20*l.*; in other words, imposing on the Company an absolute obligation to prevent, under any circumstances, the water in the neighbourhood from

being fouled by the escape of gas from their works. For these reasons I think that the plaintiff is entitled to judgment.

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WILLIAMS, J.—I am also of opinion that the judgment of the Court below should be affirmed. It has not been shewn that the manufacture of the gas might not be so conducted as to prevent the washing from flowing into the neighbouring wells. If it does, that is an offence within the meaning of the Act. I can see no hardship in the enactments, and no improbability that the legislature meant to enact that the Company shall carry on their works upon the terms of their preventing at all events the offensive fluids which they themselves create from being a nuisance to the neighbourhood. Moreover, it does not appear that the works might not be so conducted as to give no cause of complaint.

WILLES, J., HILL, J., KEATING, J., and BLACKBURN, J., concurred.

Judgment affirmed.

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Jan. 12.

ROBSON v. LEES.

A Judge at Nisi Prius has no power, under the Common Law Procedure Act, 1854, to order a compulsory reference of matters of account, since the 3rd section of that Act only applies to a reference before trial, and the 6th section to a reference by a Judge on a trial without a jury.

THIS cause came on for trial before *Blackburn, J.*, and a jury at the Liverpool Spring Assizes 1860, when the plaintiff's counsel applied to the learned Judge to refer some of the issues to an arbitrator under the 17 & 18 Vict. c. 125, on the ground that they were mere matters of account which could not be conveniently tried in the ordinary way. The learned Judge, being of that opinion, made an order referring the issues to a Master of this Court.

Spinks, in the following Term, obtained a rule calling on the plaintiff to shew cause why the order of *Blackburn, J.*, should not be rescinded, on the ground that he had no power to make such an order when the cause was tried by a jury.

C. Hutton shewed cause in last Trinity Term (June 22).—The learned Judge had power to make the order, under the 3rd section of the 17 & 18 Vict. c. 125. By that section, "If it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute con-

sists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary way, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court, &c., and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred." The 6th section only applies to cases where, under the provisions of the 1st section, the parties leave the decision of any issue of fact to a Judge without a jury. [*Bramwell*, B.—If the 3rd section applied to a reference at the trial, there would be no occasion for the 6th.]

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Spinks, in support of the rule.—The 3rd section only provides for a reference by the Court or a Judge before trial. The 6th section empowers the Judge, at his discretion, to refer matters of account upon a trial without a jury. That section says, "that the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial," that is, the award or certificate of a referee appointed under the 3rd section. That section excludes a Judge of assize. By the interpretation clause (section 99), the word "Judge" shall be understood to mean a "judge or baron of any of the superior Courts of common law at Westminster."—He also referred to the form of proceeding under this statute prescribed by the Reg. Gen. Mich. Vac. 1854.

Cur. adv. vult.

MARTIN, B., now said.—The question in this case is, whether the learned Judge before whom, with a jury, the cause

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was tried, had power to make a compulsory order of reference; and it depends on the construction of the 3rd and 6th sections of the Common Law Procedure Act, 1854. (His lordship read the 3rd section.) If this had been the only enactment on the subject, it might have been contended with considerable force that its provisions would enable a Judge to refer matters of account under circumstances like the present. It is perhaps better that we should not state what we know to be the history of these clauses, for we ought to decide solely on the language of the legislature. We must, however, take into consideration the 6th section. (His lordship read the 6th section.) It appears to us that, upon the true construction of the three sections, the power which a Judge at a trial has to make a compulsory order of reference, is restricted to those cases where, under the 1st section, he is trying an issue in fact without a jury; and that the 3rd section is limited to cases where a compulsory order is made upon a summons before a Judge at Chambers or on application to the Court in the ordinary way, and that it does not apply to a Judge at Nisi Prius trying a cause with a jury. The rule will therefore be absolute, to set aside the order of my brother *Blackburn*, and there must be a new trial unless the parties will consent to a reference.

Rule accordingly.

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ADAMS v. READY.

Jan. 29.

THE plaintiff in this case had brought an action against the defendant and obtained judgment for 18*l.* 4*s.* 6*d.* debt, and 3*l.* 14*s.* 8*d.* costs. The plaintiff, not being able to obtain satisfaction by *fi. fa.*, brought an action on the judgment, to which the defendant pleaded *nul tiel record*; and on production of the record judgment was entered for the plaintiff. An application was then made to *Martin, B.*, at Chambers to allow the plaintiff his costs of the action on the judgment, under 43 Geo. 3, c. 46, s. 4. The defendant opposed the application, and the learned Judge referred the matter to the Court.

The bringing an action on a judgment under 20*l.* with the object of obtaining a judgment above 20*l.* and issuing thereon execution against the person, is an evasion of the 7 & 8 Vict. c. 96, s. 57, and the Court, in the exercise of their discretion, under the 43 Geo. 3, c. 46, s. 4, will not allow the plaintiff his costs.

C. Pollock, in last Michaelmas Term, obtained a rule nisi accordingly; against which

The defendant, in person, shewed cause in the same Term (Nov. 24), and contended that the action on the judgment was an evasion of the 7 & 8 Vict. c. 96, which prohibits execution against the person on a judgment for a sum not exceeding 20*l.*

C. Pollock, in support of the rule.—Under the 43 Geo. 3, c. 46, s. 4, it is in the discretion of the Court or a Judge to allow the costs of an action on a judgment. *Slater v. Mackay* (a) is an authority in point. There the plaintiff had obtained judgment by default against the defendant for 15*l.* 3*s.* 6*d.* debt and 5*l.* 12*s.* 6*d.* costs. The defendant having no available property, the plaintiff brought an action on the judgment, to which the defendant pleaded *nul tiel*

(a) 8 C. B. 553.

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record, and judgment was given for the plaintiff for the amount of the debt and costs. The plaintiff having applied to the Court to allow him his costs, under the 43 Geo. 3, c. 46, s. 4, it was held that he was entitled to them, notwithstanding the original cause of action was one for which he might have entered a plaint in the County Court. [*Martin*, B.—The proper criterion is whether the plaintiff is entitled to costs at the time he commences his action: his right to costs cannot depend upon whether the defendant pleads *nul tiel record*.] The defendant ought not to have pleaded a false plea. [*Pollock*, C. B.—The statute having given us a discretionary power over the costs, why should we not give the costs of the false plea, and refuse the rest?] *Hall v. Pierce* (a) is an authority that the costs cannot be severed. There, judgment having been obtained against the defendant, he rendered in discharge of his bail and was superseded. The plaintiff brought an action on the judgment, to which the defendant pleaded *nul tiel record*. The plaintiff having applied for costs under the 43 Geo. 3, c. 46, s. 4, on the ground that the defendant had pleaded a false plea, *Parke*, B., said, “The plaintiff is seeking to rectify his blunder in not having charged the defendant in execution. The question then is, whether the defendant ought to pay, or the plaintiff to suffer the consequences of his own negligence. If the costs could be separated, the defendant ought to bear the expense of his false plea; but the Act gives no power for us to award part of the costs.” Where a defendant against whom judgment had been obtained sued out a writ of error, and, the plaintiff having brought an action on the judgment, the defendant pleaded *nul tiel record*, the Court allowed the plaintiff his costs, observing that the defendant, instead of pleading *nul tiel record*, ought to have applied to stay the proceedings.

(a) 5 Dowl. P. C. 603.

[*Martin, B.*—*Bell v. Waldron* (a) is an authority against the application.] In that case the defendant did not plead nul tiel record, but nunquam indebitatus, so that, in effect, the action was undefended.—He also referred to Gray on Costs, 168, and 1 Chit. Arch. 470, 10th ed.

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Cur. adv. vult.

MARTIN, B., now said:—This case involves a question which has been much agitated in the Courts. The plaintiff recovered judgment for a sum less than 20*l.*, and being unable to obtain satisfaction by fi. fa. he brought an action on the judgment and recovered a sum above 20*l.* An application was made to me at Chambers to allow the costs of this judgment. I referred the parties to the Court, and the question was argued last Term. We have given it great consideration, having been much perplexed by the course taken in cases of this kind. We had intended to consult the Judges of the other Courts, but as there is a difficulty, owing to the pressure of business, in seeing any considerable number of them, we have considered it our duty to deliver our judgment on the matter.

The 7 & 8 Vict. c. 96, s. 57, after reciting that "it is expedient to limit the present power of arrest upon final process," enacts "that from and after the passing of this Act no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty's Superior Courts, or in any County Court, court of requests or other inferior court, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment." It is impossible that there could be a more direct enactment by the legislature that a right to execution against the person should not exist unless the sum recovered exceeds 20*l.* exclusive of costs; and we think this enactment is binding on all Courts of

(a) 9 Jur. 510.

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law in this country, and that they ought to give effect to it. The legislature must be understood as having taken into consideration the circumstance that judgments are often recovered against persons whose property is not sufficient to satisfy them, and to have enacted that even in these cases there shall be no execution against the person. However, any person who has recovered judgment for a debt under 20*l.*, but which with the costs exceeds 20*l.*, may bring an action on that judgment, though for the avowed purpose of obtaining a judgment for a debt above 20*l.*: there is no law to prohibit him, and he may do so as a matter of right. But then the 43 Geo. 3, c. 46, s. 4, provides that the plaintiff in an action upon a judgment shall not recover or be entitled to any costs, unless the Court or a Judge shall otherwise order; and the question we have to consider is whether, when a person brings an action on a judgment with the express object of evading the 7 & 8 Vict. c. 96, s. 57, we are to interfere and allow him his costs. We have been pressed with the decision in *Slater v. Mackay* (a). That was an application for the costs of an action on a judgment, and as the defendant had pleaded nul tiel record, the Court of Common Pleas considered that this circumstance enabled them, in the exercise of their discretion under the 43 Geo. 3, c. 46, s. 4, to allow the plaintiff his costs. The judgment of the Court of Common Pleas is entitled to the greatest respect, and we have given it the fullest consideration; but we are at a loss to understand how the pleading a false plea can render the original bringing of the action right, so as to entitle the plaintiff to the costs of it. The question is, whether the bringing the action is an evasion of the 7 & 8 Vict. c. 96, s. 57; and how can it be affected by the circumstance of the defendant pleading a false plea? If we could give the plaintiff the costs of the false plea we would do so, but I doubt our

(a) 8 C. B. 553.

power. In *Bell v. Waldron (a)*, *Wightman*, J., considered that if a plaintiff has been guilty of an evasion of the 7 & 8 Vict. c. 96, s. 57, he ought not to be allowed his costs. If a plaintiff thinks proper to bring an action on a judgment for a debt under 20*l.*, for the purpose of recovering a sum above 20*l.* and issuing an execution against the person, we are of opinion that we carry out the intention of the legislature by holding, in the exercise of our discretion, that he must bear the expense of it, and ought not to be allowed his costs.

Rule discharged.

(a) 9 Jur. 510.

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MORGAN v. RAVEY and Another.

Jan. 11.

THIS was an action against the defendants as executors of the will of Joseph Dethier, deceased. The declaration stated that the said Joseph Dethier in his lifetime, before and at the time of the making of the promise and thence until the loss hereinafter mentioned, was an innkeeper and kept a certain common inn for the reception, lodging and entertainment of travellers, and whilst the said Joseph Dethier was such innkeeper and so kept the said inn as aforesaid, theretofore in consideration that the plaintiff, at the request of the said Joseph Dethier, then put up and was received by the said Joseph Dethier in the said inn, to abide in the said inn as such traveller as aforesaid, the said Joseph Dethier promised the plaintiff to keep the goods and chattels brought, or which whilst the plaintiff should so abide in the said inn as such traveller, should be brought by the plaintiff into the said inn, safely and without diminution or loss while they should be within the said

Wherever a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or a jury may infer, a promise by each party to do what is to be done by him.

Therefore an action may be maintained against the executors of an innkeeper on his implied promise to keep safely and without diminution the goods of his guest.

The executors are also liable in "tort," the loss of the goods being a wrong committed within the meaning of the 3 & 4 Wm. 4, c. 42, s. 2.

An innkeeper, though guilty of no negligence but even diligent, is liable for the loss or injury of the goods of his guest not arising from the negligence of the guest, the act of God, or the Queen's enemies.

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inn and the plaintiff should abide there as such traveller: that while the plaintiff was abiding in the said inn as such traveller as aforesaid, he (the plaintiff) had, and up to the time of the loss hereinafter mentioned continued to have, with him, as such traveller as aforesaid in the said inn, certain goods and chattels of great value, to wit, a watch, a chain, a ring, a silver pencil case, a knife, a purse and certain monies belonging to the plaintiff, which goods and chattels the plaintiff brought into the said inn as aforesaid. Yet the said Joseph Dethier, while the plaintiff was abiding in the said inn as such traveller, and the said articles and monies were so within the said inn, broke his said promise in this, that he did not keep the said goods and chattels safely and without diminution or loss, and by reason thereof the said goods and chattels were wrongfully taken away by some person or persons to the plaintiff yet unknown, and were, and still are, lost to the plaintiff.

Pleas (inter alia).—First: That the said Joseph Dethier did not promise the plaintiff as alleged.—Thirdly: That the said Joseph Dethier did not break his said promise as alleged.—Issues thereon.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings, after Trinity term, 1860, the following facts appeared:—On the 14th December, 1859, the plaintiff, who was a Manchester manufacturer, came to London and went to the Great Northern Hotel, which was at that time kept by the defendants' testator, Joseph Dethier. The plaintiff occupied a bedroom on the third floor, and over the mantel-piece was the following notice:—

“TAKE NOTICE.

“*This Building is Fire Proof.*

“Several robberies having taken place during the night in the principal hotels of London, the proprietor of the Great Northern Hotel respectfully requests all visitors to use the

night bolt. Money, jewellery, or articles of value are requested to be left at the bar, otherwise the proprietor will not hold himself responsible for any loss.

"F. DETHIER,

"Proprietor."

The plaintiff had with him a gold repeater watch and chain, a gold ring, a silver pencil case, a knife, and a purse with 5*l.* 15*s.* in it. On the night of the 15th, when he retired to rest, he placed his watch on a round pedestal at the side of the bed, and the other articles on the dressing table. The plaintiff stated that he locked the bedroom door and left the key in the lock. Witnesses were, however, called, on the part of the defendants, to prove that the plaintiff had told them he had not locked the door. When the plaintiff awoke on the following morning he found that his watch and the other articles were gone, and the door of his bedroom was slightly open.

On cross-examination the plaintiff admitted that he had seen the notice over the mantel-piece, but said that he did not read any more than the word "Notice." He did not use the night bolt.

It was submitted, on the part of the defendants, that the action was not maintainable against executors; and that there was no evidence of the promise as laid in the declaration. The learned Judge reserved the points, giving the plaintiff leave to amend; and his lordship left it to the jury to say whether the plaintiff was guilty of negligence in not reading the notice, or in not locking the door. The jury having found a verdict for the plaintiff,

Phinn, in last Michaelmas term, obtained a rule nisi to enter a nonsuit on the grounds, first, that no such action lies against executors; secondly, that the promise, as laid in the declaration, was not proved; thirdly, that, if proved, it was qualified by the notice, and that the defendant's testator was protected

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thereby: or why a new trial should not be had, on the ground of misdirection in this, that the learned Judge should have directed the jury that, if there was no negligence on the part of the defendants' testator, the defendants were not liable.

Honyman shewed cause.—First, this is not an *actio personalis*, which dies with the person. An action might have been maintained against the testator, either in case on his common law liability, or in assumpsit for a breach of contract, and, if the latter form were adopted, the money counts might be joined. A carrier may be sued in assumpsit, because a promise is *implied* from his duty to carry safely: *Max v. Roberts* (a). The rule of law is thus stated by Lord Mansfield in *Hambly v. Trott* (b):—"As to those which survive or die; in respect of the *form of action*. In some actions the defendant could have waged his law; and, therefore, no action in that form lies against an executor. But now other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where, in form, the declaration must be *quare vi et armis et contra pacem*, or where the plea must be not guilty, can lie against the executor. . . An action on the custom of the realm against a common carrier if for a tort and supposed crime; the plea is, not guilty; therefore it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So, if a man take a horse from another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor." In *Powell v. Layton* (c), Sir J. Mansfield, C. J., said, "I suppose there

(a) 12 East, 89.

(b) 1 Cowp. 371. 375.

(c) 2 Bos. & P. N. R. 365. 370.

can be no doubt, and, indeed, it is so stated by Lord *Mansfield* in *Hambly v. Trott* (a), that if a common carrier accept goods to carry, and then die, an action will lie against his executor. How is that? Why, because the action is founded on contract." [*Wilde*, B.—In *Story on Bailments*, sect. 470, p. 495, 5th ed., it is said that "the custody of the goods may be considered as accessory to the principal contract."] Before the statement of a promise was abolished by the Common Law Procedure Act, 1852, s. 49, it was usual to declare against a carrier on his promise "safely and securely to carry and convey." This subject was discussed in *Boorman v. Brown* (b), which established this principle, that wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or on contract. That was an action against a broker for a breach of duty in delivering goods without payment of the price, and as the duty arose from express contract it was held that he was liable either in assumpsit or case. *Tindal*, C. J., in delivering the judgment of the Court of Exchequer Chamber, said (c):—"That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or nonperformance is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attornies, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship-owners on bills of lading, against bailees of different descriptions; and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff." [*Channell*, B.—The

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(a) 1 Cowp. 375.

(b) 3 Q. B. 516; 11 Cl. & F. 1.

(c) 3 Q. B. 525.

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rule must be taken with this limitation, that a plaintiff cannot, by changing the form, make the defendant responsible in the one action when he would not have been responsible in the other.] *Tattan v. The Great Western Railway Company* (a) will be relied on, but that case only decided that an action against a common carrier for the loss of goods, being founded on a breach of the common law duty, was not within the 19 & 20 Vict. c. 108, s. 30, which deprived a plaintiff of costs where the defendant suffered judgment by default in an action to recover a sum not exceeding 20*l*. At all events the declaration may be amended by inserting a count founded on the 3 & 4 Wm. 4, c. 42, s. 2, which provides "that an action of trespass, or trespass on the case, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate," &c.—Secondly, it is objected that the promise as laid in the declaration was not proved. [*Pollock*, C. B.—It was proved if such a promise can be implied.] In *Ross v. Hill* (b), which was an action against a cab proprietor for the loss of a portmanteau, the declaration alleged that the defendant promised the plaintiff to carry him and his luggage *safely and securely*: it was objected that the promise was laid too largely, inasmuch as it cast on the defendant the liability of an insurer, as a common carrier: but the Court of Common Pleas held that the words "safely and securely" might receive a more modified construction, and be held to mean safely and securely, regard being had to the relative rights and duties

(a) 29 L. J., Q. B. 184.

(b) 2 C. B. 877.

of the parties. So here the word "safely" may be construed to mean "with due and reasonable care."—Thirdly, the promise is not qualified by the notice. [*Pollock*, C. B.—In my opinion the notice does not apply to articles which a person ordinarily carries about him. He must take his watch into his bedroom, or it would be of no use to him. If the watch was set with valuable diamonds, the notice might apply.] It is not competent for an innkeeper to repudiate all responsibility for loss. The right of a carrier to limit his common law liability has been set at rest by the 11 Geo. 4 & 1 Wm. 4, c. 68; but the notice for that purpose is inoperative unless it comes to the knowledge of the party: *Kerr v. Willan* (a). Here there is no evidence that the contents of the notice were known to the plaintiff; and therefore he did not become a guest on those terms. Moreover the notice does not apply to such articles as the plaintiff lost.—Fourthly, there was no misdirection. The fact of goods being stolen from a public inn is *prima facie* evidence of negligence on the part of the innkeeper: *Dawson v. Chamney* (b). In that case the nature of the inquiry left the cause wholly doubtful, and, therefore, it was a question for the jury, whether it arose from want of care on the part of the innkeeper. [*Wilde*, B.—In *Story on Bailments*, sect. 472, p. 498, 5th ed., it is said:—"But innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest while at an inn will be presumptive evidence of negligence on the part of the innkeeper or his domestics. But he may, if he can, repel this presumption, by shewing that there has been no negligence whatsoever; or that the loss is attributable to the personal negligence of the guest himself."] The law is thus stated in *Bac. Abridg.* "Inns and Innkeepers," (C) 4. "Innkeepers are clearly chargeable for the goods of

(a) 6 M. & Sel. 150.

(b) 5 Q. B. 164.

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guests stolen or lost out of their inns, and this without any contract or agreement for that purpose; for the law makes them liable in respect of the reward, as also in respect of their being places appointed and allowed by law, for the benefit and security of traders and travellers." A person who takes in horses to agist, does not, like an innkeeper, insure their safety: *Broadwater v. Blot* (a). In *Burgess v. Clements* (b), the goods were lost through the negligence of the plaintiff, out of a private room which he had hired for the purpose of trade, and not as a guest. Lord *Ellenborough*, C. J., there points out "that the law obliges an innkeeper to keep the goods of persons coming to his inn, *causa hospitandi*, safely, so that, in the language of the writ, *pro defectu hospitatoris damnum non eveniat ullo modo*." But where a traveller went to an inn and desired to have his luggage taken into the commercial room, to which he resorted, from whence it was stolen, it was held that the innkeeper was responsible, although he proved that according to the usual practice of his house the luggage would have been deposited in the guest's bedroom, and not in the commercial room, if no order had been given respecting it: *Richmond v. Smith* (c). *Bayley*, J., there said:—"It appears to me that an innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the King's enemies, although he may be exonerated where the guest chooses to have his goods under his own care." [*Wilde*, B.—That is a mere dictum, not necessary for the decision of the case.] By the custom of the realm innkeepers are bound to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss by day or night: *Cayle's Case* (d). In delivering the judgment of the Court in *Cashill v. Wright* (e), *Erle*, J., said:—"We think that

(a) Holt N. P. 547.

(d) 8 Rep. 32 a.

(b) 4 M. & Sel. 306.

(e) 6 E. & B. 891. 900.

(c) 8 B. & C. 9.

the rule of law, resulting from all the authorities, is that in a case like the present, the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper *liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.*"—He also referred to Story on Bailments, sects. 468, 470, 471, 472, 482.

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Phinn and *W. H. Lloyd*, in support of the rule.—First, there is no instance of an action against an innkeeper upon a *promise* to keep the goods of his guest safely. The form of action has always been *case* upon the custom of the realm. Neither is there any instance of an action against an innkeeper in which the breach has been laid so widely as in this declaration. The promise alleged is not that implied by law. This declaration can only be supported by proof of an express promise. The authorities, from the earliest case to that of *Cashill v. Wright (a)*, shew that an action against an innkeeper is founded on a breach of duty. The extent of his obligation is the duty cast upon him by law, and his liability does not arise out of any relation between him and his guest, from which a promise is implied. The doctrine on this subject has been borrowed from the Roman law; but by that law an innkeeper might elect whether he would receive a guest, whereas by the common law he is bound to do so, if he has room. Suppose an innkeeper refused to receive a guest, who thereupon tendered him a reasonable sum for his lodging, upon which the innkeeper received him, could it be said that there was a contract between them? There is no authority for saying that a presumption of negligence, on the part of the innkeeper, arises from the

(a) 6 E. & B. 891.

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loss of the guest's goods. The form of writ in *Calye's Case* (a) states that the horse was stolen, "*pro defectu ipsius B.*," shewing that there must be a default on the part of the innkeeper. It is true that in some cases an innkeeper is liable in assumpsit, as, for instance, upon his undertaking to provide food and lodging; but there is no authority that an action founded on contract will lie against an innkeeper for the loss of his guest's goods. The authorities relied on are all actions against carriers. The dicta of Lord *Mansfield* in *Hambly v. Trott* (b) were extrajudicial, the only question being whether trover would lie against an executor. The observations of Sir *J. Mansfield*, in *Powell v. Layton* (c), were merely in illustration of that particular case. *Pozzi v. Shipton* (d), and *Marshall v. The York, Newcastle and Berwick Railway Company* (e), shew that the liability of a carrier is not founded on contract, but on the general custom of the realm. The decision in *Tattan v. The Great Western Railway Company* (f) proceeded on the express ground that the common law duty to carry safely arises independently of contract. A legal duty is not necessarily convertible into a contract. [*Pollock*, C. B.—It is the duty of a returning officer to make a proper return; but there is no contract on his part that he will do so.] Even assuming that the duty of an innkeeper could be converted into a contract, it would not be such a contract as is stated in this declaration.—Secondly, the learned Judge misdirected the jury. An innkeeper is not an insurer. He is only bound to use reasonable care and diligence in keeping the goods of his guest; and if he has done so, he is not responsible for their loss. In this declaration the promise and breach are too large; the

(a) 8 Rep. 32 a.

(b) 1 Cowp. 371. 375.

(c) 2 N. R. 365. 370.

(d) 8 A. & E. 963.

(e) 11 C. B. 655.

(f) 29 L. J., Q. B. 184.

innkeeper is treated as an insurer. In *Ross v. Hill* (a), where the duty alleged was to carry "safely and securely," there was a long series of precedents which justified the Court in construing those words with reference to the duty or promise implied by law from the relation of the parties. Here the duty alleged should have been to take due and proper care, as an innkeeper, of his guest's goods; and then the defendant might have taken issue on the breach. There is no precedent in which the loss or injury is not stated to have occurred through the default of the innkeeper. In these cases the proper direction is that of *Cresswell, J.*, in *Dawson v. Chamney* (b), who told the jury to find for the plaintiff, if they were of opinion that the defendant, by himself or his servants, had been guilty of direct injury or of negligence, otherwise for the defendant. The plaintiff was warned that robberies had taken place in the night at hotels, and was advised to use the night bolt, which he neglected to do.—Thirdly, assuming that such a promise as here laid can be implied, it was qualified by the notice: 1 Smith's Lead. Cas. 175. In *Richmond v. Smith* (c), Lord Tenterden, C. J., said "It is clear that, at common law, when a traveller brings goods to an inn the landlord is responsible for them. And if it had been intended by the defendant not to be responsible, unless his guests chose to have their goods placed in their bedrooms, or some other place selected by him, he should have said so." In the fourth resolution in *Calye's Case* (d) it is said: "The innkeeper requires his guest that he will put his goods in such a chamber, under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest, as it was

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(a) 2 C. B. 877.

(b) 5 Q. B. 164.

(c) 8 B. & C. 9.

(d) 8 Rep. 33 a.

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held in 16 Eliz., Dyer, 206." [*Pollock*, C. B.—That is very different from the notice in this case. Probably at that time few persons could read.] If the guest is guilty of negligence, conducing to the loss, the innkeeper is not liable: *Armistead v. Wilde* (a), Story on Bailments, sect. 472, p. 439, 6th ed.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a rule to set aside the verdict for the plaintiff and enter a nonsuit, or for a new trial. The action was by a guest against the executors of an innkeeper, whose property had been stolen during the night. The jury found a verdict for the plaintiff.

We are of opinion that this rule should be discharged. We think the plaintiff proved the declaration as it stands. We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him. We cannot distinguish this case from the case of a carrier. If so, the objection that such an action would not lie against executors because it is for a tort does not arise. It is not, however, necessary to determine this if the plaintiff elects to amend, which he may do, and we think successfully; because it seems to us, notwithstanding the ingenious argument of Mr. *Phinn*, that if the claim against the defendants is for a tort, it is for a "wrong committed," within the meaning of the 3 & 4 Wm. 4, c. 42, sect. 2.

Then, being, for these reasons, of opinion that the action

(a) 17 Q. B. 261.

will lie against the executors if it would have done so against the testator, it remains to consider whether the direction to the jury was correct. We think it was. The objection was that it assumed the defendants were liable if there was negligence in the plaintiff, and that therefore the defendants would be liable, though not only not negligent, but even diligent. But we think that is the law. It is true, the expression in the forms in "tort" is, that the loss was "propter defectum" of the innkeeper; but we think the cases shew that there is a defect in the innkeeper, wherever there is a loss not arising from the plaintiff's negligence, the act of God or the Queen's enemies. The only case that points the other way is *Dawson v. Chamney*, as reported 5 Q. B. 164. According to the report, however, of that case in 7 Jurist, 1037, "there was no evidence of the manner in which the horse received the injury for which the action was brought" (a). This may be the explanation of that case; for though damage happening to the horse from what occurred in the stable might be evidence of defectus or neglect, still, if it was not shewn how the damage arose, it was not even shewn that it arose from what occurred in the stable. This would reconcile that case to the general current of authorities.

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Rule discharged.

(a) This report is evidently incorrect. The judgment, which was written, commences thus (5 Q. B. 168):—"This was a motion for a new trial on the ground of misdirection, the learned Judge having told the jury that the

innkeeper was not answerable for injury done to the horse of a guest placed in his stable by the kick of another horse, unless there was some negligence proved in the innkeeper."

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MILLER and Others v. TETHERINGTON.

A custom that underwriters are not liable, under the ordinary form of policy, for general average in respect of the jettison of goods stowed on deck, is a valid custom and does not contradict the terms of the policy.

DECLARATION.—That the plaintiffs made their policy of insurance in the words and figures following:—“Be it known that Miller, Houghton and Co., as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make insurance, and cause themselves, and them and every of them, to be insured, lost or not lost, at and from Miramichi to Liverpool, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the new ship, declared ‘The Chatsworth,’ 9th September, whereof — is master, &c., beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, upon the said ship, &c., including collision clause, and so shall continue and endure during her abode there, upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at as above, upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to, and touch and stay at, any port or places whatsoever, without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the insured, by agreement between the insured and insurers in this policy, are and shall be valued at on ship, valued at 8000*l*.,

warranted to sail on or before the 1st September, 1859. Touching the adventures and perils which we, the insurers, are contented to bear and do take upon us in this voyage; they are, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nature, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, and ship, &c., or any part thereof; and in case of any loss or misfortune, it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof we, the insurers, will contribute, each one according to the rate and quantity of this sum herein insured. And it is agreed by us, the insurers, that this writing or policy of insurance, shall be of as much force and effect as the surest writing or policy of insurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London; and so we, the insurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the insured, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this insurance by the insured, at and after the rate of 40s. per cent. In witness whereof we, the insurers, have subscribed our names and sums insured in Liverpool. N.B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under

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5*l*. per cent. ; and all other goods, and also the ship and freight, are warranted free from average under 3*l*. per cent., unless general, or the ship be stranded. And we further agree, that in case the said ship shall come into collision with any other ship or vessel, and the insured shall, in consequence thereof, become liable to pay, and shall pay (as damages to the owners or charterers of such other ship or vessel, or to the owners or consignees of the cargo thereof, or to the master and crew or passengers thereof), for the loss of or injury to their goods and effects on board such other vessel, or for costs (but not for damages for loss of life or personal injury to individuals), any sums not exceeding the value of the ship or vessel, new ship, and her freight, by or in pursuance of the judgment of any Court of law or equity, or of the Court of Admiralty, or by or in pursuance of any award made upon any reference entered into by the insured, with our previous consent in writing, we will severally bear and pay such proportion of three-fourth parts of sums so paid as aforesaid, as our respective subscriptions hereto bear to the value of the said ship or vessel hereby insured, and her freight, warranted free from capture, seizure, or detention, and all other consequences of hostilities." That thereupon, afterwards, in consideration that the plaintiffs then paid to the defendant a certain sum of money, to wit 34*s*., as a reward and premium for the insurance of 85*l*. upon the premises in the said policy mentioned, the defendant became and was an insurer on the said policy, and duly subscribed the same as such insurer of the said sum of 85*l*. upon the said premises in the said policy mentioned ; and the plaintiffs, or some or one of them, were and was interested in the said ship, the matter of the said insurance, to the whole value so insured, and the said insurance was so made for their use and benefit, and divers goods were shipped on board of the said ship for the voyage in the said

policy mentioned, and were lawfully on board the same, to be carried for certain freight and hire; and the ship, with the goods lawfully on board, departed and set sail from the port of Miramichi, on the voyage in the policy mentioned, and all things happened and were done of every kind to entitle the plaintiffs to maintain this action; and while the said ship was proceeding on the said voyage with the said goods so lawfully on board, the said ship was, by divers of the perils insured against, damaged, to the great loss and damage of the plaintiffs; and also during the said voyage and risk certain of the said goods, and part of the said ship and freight, were necessarily sacrificed, and part of the said goods was necessarily jettisoned, for the safety of the said ship, freight, and cargo, and for the safety of the said ship from the perils insured against, to a great value; and divers sums were expended and sacrifices made by the plaintiffs in and about the suing, labouring and travelling in and about the safeguard of the ship; and the plaintiffs lost the said sums so expended, and had also to pay and contribute, and did pay and contribute, as and for general average, and as and for the contribution due and owing for the ship, &c.

Pleas.—First, as to so much of the declaration as relates to the jettison of the goods: that the goods so jettisoned consisted of timber stowed upon the deck of the ship for the voyage, being a voyage from a port in British North America to a port in England; and that the policy was made in Liverpool; and that, before and at the time of the making of the policy, there had been and was, at Liverpool and elsewhere in England, a well-known and approved usage and custom of trade among shipowners and underwriters, in the trade of carrying timber from British North America to England, that underwriters on ships are not liable, under the ordinary form of policy, such as the policy in the declaration mentioned, to pay or contribute towards any general average or contribution payable by the

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shipowner on account of the jettison of any timber stowed upon deck; of which usage and custom the plaintiffs and the defendant, at the time of the making of the policy, had notice, and made the policy with reference thereto.

Secondly, as to so much of the declaration as relates to the jettison of the goods: that the goods so jettisoned consisted of timber stowed upon the deck of the ship for the voyage, being a voyage from a port in British North America to a port in England; and that the policy was made in Liverpool; and that, before and at the time of the making of the policy, there had been and was, at Liverpool and elsewhere in England, a well-known and approved usage and custom of trade among shipowners, shippers, merchants, and underwriters, in the trade of carrying timber from British North America to England, that the loss occasioned by the jettison of timber loaded on deck, for the preservation of the ship and cargo in such voyages, is not contributed for by any general average among all the owners of the ship, freight, and cargo on board such ship, but the loss so occasioned by such jettison is, in the first place, apportioned over the ship, the freight of cargo both on and under deck, jettisoned and not jettisoned, and the cargo both on and under deck, both jettisoned and not jettisoned, according to their respective values, by a statement which is called general contribution; but no owner of any of the above interests is, by custom, liable for the proportion falling on his interests, except those who are parties to the contract for the carriage of cargo on deck; and by the same usage and custom no underwriter on a ship is liable, under the ordinary form of policy, such as the policy in the declaration mentioned, to pay or contribute towards the amount of the said general contribution payable or to be borne by the shipowner on account of the jettison of any timber stowed upon deck; of which said usage and custom the plaintiffs and the defendant, at the time of the making of the said

policy, had notice, and made the said policy with reference thereto. And that, by reason of the said usages and customs, the plaintiffs, as the owners of the said ship, had not become liable to pay, nor had they paid, any sum, as general average, on account of the jettison of the goods in the declaration mentioned, but had become liable to contribute towards such general contribution as aforesaid, which was the only loss sustained by the plaintiffs, as the owners of the said ship, on account of the jettison of the goods.

Demurrers to pleas.

Replication to first plea.—That there had been and was a known and approved usage of trade among shippers and carriers of timber from British North America to England, for the carrying of timber upon deck during the season of the year wherein the carrying of timber upon deck is not prohibited by statute; and a known and approved usage of trade, whereby the underwriters at Liverpool insure such timber carried partly below and partly above deck, or all below or all above deck, by the words “on and over all;” and that the said timber was being carried during the season when such carrying upon deck is allowed and permitted by law, and was well and safely stowed according to the said usage and custom for carrying the same.

Replication to second plea.—That at the time aforesaid there had been and was a known and approved usage and custom of trade among shippers and owners of timber from British North America to Liverpool and elsewhere in England, and at Liverpool aforesaid, for the carrying of timber upon deck during the season of year wherein the carrying of timber upon deck is not prohibited by statute; and a known and approved usage of trade between merchants and underwriters of Liverpool aforesaid, whereby underwriters insure such timber so carried along with other timber by the words in the policies “on and over all;” and that such timber in

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the plea mentioned was being carried upon deck during the season when such carrying was not prohibited by statute, and was allowed and permitted by law, and was well and safely stowed according to the said usage and custom for carrying the same; and that the said general contribution, in the plea mentioned as a contribution to which the plaintiffs were liable, amounted to a greater sum than a general average contribution.

Demurrers to replications.

Broun, for the plaintiffs.—The pleas are bad. They set up customs which contradict the terms of the policy by which the underwriter is responsible for general average. The obligation to pay general average arises from law, and there cannot be a custom not to pay that which a person has undertaken to pay. In *Hall v. Janson* (a), which was an action on a policy of insurance, with “freight warranted free from average under 5l. per cent., unless general,” the interest insured being “money advanced to the insured as owner of the ship,” on account of the freight and cargo loaded on board and subject to the risk of the voyage, this was held an insurance on freight, and that a custom in a particular place that insurers of money advanced on freight were not liable to make good an average loss, was inconsistent with the policy, and therefore inadmissible. [*Martin*, B., referred to *Milward v. Hibbert* (b).] There the only question was as to the validity of a custom in a certain trade to stow goods on deck. In *Blackett v. The Royal Exchange Insurance Company* (c), which was an action on a policy, in the usual form, on ship, tackle, boat, &c., evidence of usage that the underwriters never pay for the loss of boats on the outside of the ship, slung upon the quarter, was held inadmissible. *Gould v. Oliver* (d) is an

(a) 4 E. & B. 500.
 (b) 3 Q. B. 120.

(c) 2 C. & J. 244.
 (d) 4 Bing. N. C. 134.

authority that there is nothing illegal in carrying goods on deck, provided they are not stowed in an improper manner. [*Martin*, B.—What is there to prevent an underwriter from saying that he will not be responsible for the loss of cargo stowed in a particular manner?] By this policy, the underwriter has contracted to pay in respect of *all* jettison. The custom of general contribution, alleged in the second plea, is unreasonable and against the policy of the law. Even if it be good, the underwriter is bound to reimburse the plaintiff the amount he has paid. General contribution is in effect general average. The pleas being bad, it is not necessary to argue in support of the replications.

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Mellish, for the defendant.—The customs alleged in the pleas are reasonable and do not contradict the policy in the sense of the rule by which evidence is inadmissible to contradict a written document. The carrying a cargo on deck is dangerous and increases the probability of jettison. The legislature has prohibited the practice, between the 1st of September and the 1st of May, in trading from British North America and Honduras (*a*). *Ross v. Thwaite*, cited in *Park on Insurance* (*b*), was an action on a policy of insurance of the captain's goods for six months certain. The loss was chiefly for goods lashed on deck, the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker that none of those things are within a general policy on goods, for the risk was greater as to goods lashed on deck than on other goods; and a policy on goods means only such goods as are merchantable and a part of the cargo. They also swore that when goods like the present are meant to be insured, they are always insured by name, and the premium is greater. Lord *Mansfield* said, he thought it consistent with reason, and understood the usage to be so; therefore

(*a*) 8 & 9 Vict. c. 93, ss. 24. 26. (*b*) 1 *Park on Ins.* 23, 8th ed.

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he advised the plaintiff to withdraw a juror, the premium having been paid into Court, to which he consented." The learned author then says, "And in a more modern case (a), Mr. Justice *Chambre* and a special jury decided that goods stowed on deck were not within a general policy on goods (b)." These replications admit that the custom still exists at Liverpool. The insurance of timber on deck by the words "on and over all," shews that deck cargo would not be included in the policy without those words. Then, if by custom deck cargo may be excluded, by the same custom general average in respect of it may also be excluded. If an ordinary policy upon goods is not contradicted by shewing a custom that a cargo on deck is not included, à fortiori such a policy is not contradicted by shewing that jettison of deck cargo is not included in general average. The only difficulty arises from the case of *Blackett v. The Royal Exchange Insurance Company* (c). There Lord *Lyndhurst* said:—"Usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain. The cases which are collected in 1 Phillipps and Starkie upon Evidence (d) clearly establish this position; and a reference is made to the same subject in the second volume of Mr. Phillipps's book (e):—"If, however, those words are to be taken literally, many usages would be overthrown." The authorities on this subject were commented on in *Myers v. Sarl* (f). That was an action on an agreement under seal, by which the plaintiff contracted to build for the defendants a house and premises for a certain sum, and it was provided that "no alterations or additions should be admitted unless directed by the defendant's architect, by writing under his hand, and a weekly account of the work done thereunder

(a) *Backhouse v. Ripley*, Sitings after Mich. T. 1802, in the Court of Common Pleas.

(b) 2 C. & J. 244.

(c) Pp. 553 to 559.

(d) Pp. 1032 to 1038.

(e) Pp. 36, 37.

(f) 30 L. J., Q. B. 9.

should be delivered to the architect every Monday next ensuing the performance of such work :” it was held that parol evidence was admissible to shew that, by the usage of the building trade, “weekly accounts” meant accounts of the day work only, and did not extend to extra work capable of being measured.

The Court then called on

Broun, who replied.

MARTIN, B.—We are all of opinion that the pleas are good. The declaration is on a policy of insurance in the ordinary form on a ship and cargo, and no doubt in such case the underwriter is responsible for general average properly so called. The defendant by his plea says, “I admit that the underwriter is responsible for general average ; but there is at Liverpool an usage and custom to the effect that, when a claim for general average arises by reason of jettison of deck cargo, the underwriter is not responsible ; and the plaintiffs and defendant had notice of the usage at the time of making the policy, and made the policy with reference to it.” No doubt, the rule of law is that an underwriter is responsible for general average, but here it is admitted by the demurrers that the policy was made on the express understanding which I have mentioned, and it is for Mr. *Broun* to shew that this understanding cannot take effect. He has failed to do so ; and I think the real answer is that given by Mr. *Mellish*, viz., that the usage is in truth no contradiction of the policy in the sense of the rule that evidence is inadmissible to contradict a written contract, but merely explains it and shews the species of general average for which the underwriter is responsible. Where the words of a contract are not those ordinarily used, but such as are used in a particular trade, it is always competent to shew the sense in which they are used. There are a variety

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of contracts with respect to which gross injustice would be done unless the parties were allowed to shew what the terms of them really meant. The case of *Blackett v. The Royal Exchange Insurance Company* (a) is supposed to be an authority for the plaintiffs, but Lord *Lyndhurst*, in his judgment, points out that the case of goods lashed upon deck is plainly distinguishable and stands upon a different principle, and that an underwriter may shew that he is not responsible for a cargo loaded on deck. The principle is this, that the term "shipped on board" means shipped in that part of the vessel usually appropriated to the stowage of goods, and consequently the underwriter is not liable for jettison unless the goods are shipped in the ordinary way. I agree with Mr. *Mellish* that from the use of the words "on and over all," in the replications, the parties well knew what they were doing; and that, for the purpose of making the underwriters responsible, those words must be inserted in the policy. For these reasons I am of opinion that the pleas are good.

CHANNELL, B.—I am also of opinion that the pleas are good, and that they are not answered by the replications; therefore the defendant is entitled to judgment. The pleas do not deny that upon an ordinary policy the underwriter is liable for general average, and the question is whether a custom that he shall not be responsible for jettison in respect of a cargo shipped on deck contradicts the language of the policy. I am of opinion that it does not. The defendant is liable for general average by virtue of the policy, but the effect of this custom is to limit his liability in respect of a particular portion of the cargo. I have great difficulty in reconciling the decision in *Blackett v. The Royal Exchange Insurance Company* (a) with that of *Ross v. Thwaite* (b), but I am of opinion that in this case there is no such contradiction of the policy as to exclude the custom. I am disposed to

(a) 2 C. & J. 244.

(b) 1 Park on Ins. 23, 8th ed.

adopt the view of my brother *Blackburn* in *Myers v. Sarl(a)*, that the true test is whether the custom is applicable to the language used; and that where a custom is well known to exist, the parties must be taken to have contracted with reference to it. Here the words of the policy shew that the parties meant to exclude the custom. Of course each case must depend on its particular circumstances.

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WILDE, B.—I am also of opinion that the pleas are good. They shew that, although an underwriter is usually liable for general average, there is a custom at Liverpool, which the plaintiffs and defendant knew, that an underwriter is not responsible for general average in respect of a cargo loaded on deck, and the first question is whether that is a reasonable custom. I should have said it was reasonable if the matter had stopped there. An underwriter who receives a premium without knowing whether there will be a deck cargo, and who receives no more if a deck cargo is carried, may well say "I will not be exposed to loss by reason of a deck cargo." But the second plea discloses another matter which makes this more reasonable, viz., that by custom the owners of under deck cargo are not liable to contribute. But the main objection is that the custom contradicts the terms of the contract. I think it does not. Where general words are used, evidence which shews that in a particular trade they have a more limited meaning is not contradictory. The words "general average" are in a certain sense terms of art, and capable of being explained by custom as having a peculiar meaning. It is not unreasonable to hold that custom good, which was well known to both parties and upon the faith of which they contracted.

Judgment for the defendant.

(a) 30 L. J., Q. B. 9.

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SANTOS v. BRICE and Another.

A charter-party stipulated that the ship should load a cargo of coal at Cardiff and proceed to Pernambuco and there deliver the same, and afterwards receive a full cargo of sugar and other merchandise, and therewith proceed to a safe port in the United Kingdom, and deliver the same on being paid freight at the rate of 60s. per ton of 20 cwt. nett for sugar, and for other produce at a rate proportionate thereto, being in full for the round.

"The freight to be paid in

the following manner:—150*l.* on signing bills of lading at Cardiff, cash for disbursements abroad at the current rate of exchange, and the remainder on the delivery of the cargo. The master to sign bills for each cargo at any rate of freight that might be tendered. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft on charterers, at usance, which they agreed to accept and pay on consignee at loading port agreeing amount."—*Held*, that the two clauses were not inconsistent, their meaning being that if the bill of lading freight was less than the charter freight, the difference was to be paid at the port of loading by the captain's draft on the charterers, at usance, if the consignee settled the amount, otherwise at the port of delivery.

DECLARATION.—That by a charter-party of affreightment, dated the 10th day of December, 1859, and made between the plaintiff, master of the ship "St. Jargo d'Aviero 5½ Veritas," of the one part, and the defendants, merchants and freighters, of the other part, it was, amongst other things, agreed that the said ship should with all convenient speed sail and proceed to Cardiff or Newport as ordered, and there load from the factors of the defendants a full and complete cargo of coal with which she should proceed to Pernambuco and there deliver the same, according to the custom of the port, to the agents of the defendants; and afterwards, in the customary manner, receive a full and complete cargo of sugar in bags, and other lawful merchandise, it being understood that no cargo was to be taken but that supplied by the agents of the charterers on their account, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions and furniture; and being so loaded should therewith proceed to Cork, Falmouth or Cowes for orders, which were to be given by return of post, or the lay days to count: to dis-

charge at a safe port in the United Kingdom or on the Continent, as therein mentioned, and deliver the same in the usual manner on being paid freight at and after the rate of 60s. per ton of 20 cwt. nett for sugar in bags, with 10l. gratuity; and for other produce at a rate proportionate thereto, being in full for the round: the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever, during the said voyage, excepted. The freight to be paid in the following manner:—150l. on signing bills of lading at Cardiff, less interest for three months, and the costs of insurance; cash for disbursements abroad at the current rate of exchange, free of interest and commission, and the remainder on the delivery of the cargo, less discount for two months on half freight. The ship to be addressed to the charterers' agent abroad, paying one commission only of 3l. per cent. on the amount of freight, either at port of loading or discharge, at merchant's option. The master to sign bills for each cargo at any rate of freight that might be tendered, without prejudice to that charter-party. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft on charterers, at usance, which they agree to accept and pay on consignee at loading port agreeing amount. It was also understood that if the outward cargo did not amount to the same gross quantity as the homeward one, a corresponding abatement was to be made in the freight. Sufficient coal for the ship's use to be taken, say to the extent of 1l. per cent. of the outward cargo.—Averments: that the said ship afterwards, in pursuance of the said agreement, did proceed to Newport as ordered, and did there load from the factors of the defendants a full and complete cargo of coal, and pro-

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ceeded therewith to Pernambuco, and did there deliver the same, according to the custom of the port, to the agents of the defendants; and afterwards, in the customary manner, did receive from them a full and complete cargo of sugar in bags, and other lawful merchandize, and did therewith proceed to Liverpool, being ordered by the defendants so to do, and there delivered the said cargo in the usual manner: that all conditions were performed and fulfilled, and all things happened and were done, and all times elapsed, necessary to entitle the plaintiff to the performance of the said agreement by the defendants.—Breach: that the defendants did not pay to the plaintiff for the voyage round freight after the rate and in the manner in the said charter-party mentioned and agreed upon, with 10*l.* gratuity as aforesaid, and there is now due and owing from the defendants to the plaintiff, for and on account of the said freight and gratuity, a large sum of money, to wit, the sum of 156*l.* 14*s.* 4*d.*, contrary to the terms, true interest and meaning of the said charter-party.

Plea.—That the plaintiff, agreeably to the said charter-party, signed bills of lading for the homeward voyage at certain rates of freight in the said bills of lading specified, and that the plaintiff received divers sums of cash at Cardiff, and for disbursements abroad, pursuant to the terms of the said charter-party; and that they, the defendants, were always ready and willing to accept the captain's draft on them for the difference between the bill of lading freight on the homeward cargo and the amount remaining due to the plaintiff, but the consignee at the loading port did not agree as to the amount in manner required by the said charter-party, nor did the plaintiff draw upon or tender to the defendants, for their acceptance or payment, any draft for the amount, agreeably to the terms of the said charter-party.

Demurrer and joinder therein.

Archibald, in support of the demurrer.—The plea is bad. The question turns on the meaning of two clauses in the charter-party, which are inconsistent, and can only be reconciled by construing them as giving to the owner an option. The first provides that the remainder of the freight is to be paid “on the delivery of the cargo, less discount for two months on half freight:” by the other, the “owners are to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain’s draft, at usance, which they agreed to accept and pay on consignee at loading port agreeing amount.” That clause was inserted for the benefit of the plaintiff. The ship might be loaded on her homeward voyage as a general ship, and, since the master was at liberty to sign bills of lading for each cargo at any rate of freight, there might be a difference between the bill of lading freight and the charter freight. If the bill of lading freight was less than the charter freight, it might be advantageous to the shipowner to have the option of payment of the difference at the port of loading by bills, which might be due and paid before the vessel arrived in England. On the other hand, he might choose to await the arrival of the ship in England, when he would be entitled to the charter freight. These considerations explain and reconcile the clauses. It could never have been intended that the agreement of the consignee abroad, who is a stranger to the contract, to the precise amount, should be a condition precedent to the recovery of the freight after it had been earned; otherwise this absurd result would follow, that the shipowner’s right of action would depend on whether the consignees chose to settle the amount. The only way to give effect to these clauses is by construing

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them as giving the shipowner an option ; but, if they are repugnant, the earlier must prevail.

The Court then called on

Honyman, contra.—It is, no doubt, difficult to reconcile these clauses ; but the intention was that the difference between the bill of lading freight on the homeward cargo and the amount remaining due to the plaintiff after payment of disbursements abroad, should be ascertained by the consignee at the port of loading, and that the master should draw bills on the defendants for the amount, the object being to prevent any dispute as to the proportional rate for sugar and other produce. Therefore the ascertaining the amount by the consignee, and drawing the bills by the master, are conditions precedent to the defendant's liability to pay the freight. If the two clauses cannot be reconciled, the former must be rejected : *Alsager v. The St. Katherine Dock Company (a)*. [*Martin*, B.—The whole may be reconciled.—The shipowner is to be paid freight at the rate of 60s. per ton of 20 cwt. nett for sugar—150*l.* on signing bills of lading at Cardiff—cash for disbursements abroad—and the remainder on delivery of the cargo. But the defendants are at liberty to load other merchandise ; and it is provided that the master shall “sign bills of lading for each cargo at any rate of freight that might be tendered.” The master, therefore, was bound to take any goods that were offered to him, and to sign bills of lading for them. It might be, that the bill of lading freight exceeded the charter freight, and then the shipowner would have money coming to him which would be paid on delivery of the cargo ; or it might happen, as it did occur, that the bill of lading freight was less than the charter freight,

(a) 14 M. & W. 794.

and then the difference was "to be paid at the port of loading, by the captain's draft on charterers, at usance, on consignee at loading port agreeing amount." These latter words are to be read "upon the occasion or in the event" of the consignee settling the amount. This construction renders the whole consistent.]

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Per CURIAM (a).—There must be judgment for the plaintiff.

(a) *Pollock, C. B., Martin, B., and Wilde, B.*

SCOTSON and Others v. PEGG.

Jan. 28.

DECLARATION.—For that in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant a certain cargo of coals, then on board a certain ship of which plaintiffs the defendant to take the same from and out of the said ship, the defendant promised the plaintiffs to unload and discharge the same at the rate of forty-nine tons of the said coals during each working day, after the said ship was ready to unload and discharge the same. And although the plaintiffs did afterwards deliver the said cargo to the defendant, and were always ready and willing to suffer and permit him to take the same from and out of the said ship as aforesaid, and although all things were done, and conditions precedent to be performed by the plaintiffs were performed by the plaintiffs, to entitle the plaintiffs to a performance of the

The performance of an act which a person has agreed with another to perform, is a good consideration to support a contract with a third person if the latter derives a benefit from the performance.

Therefore where a declaration stated that, in consideration that the plaintiff would deliver to the defendant a cargo of coals on board the plaintiff's

ship, the defendant promised to discharge the same at the rate of forty-nine tons a-day:—*Held*, that a plea was no answer which stated that the plaintiffs had made a previous contract with other persons for the delivery of the coals to their order in the same way, and they ordered the delivery to the defendant.

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said promise by the defendant : Yet the defendant did not unload and discharge the said cargo at the rate aforesaid during each working day after the said ship was ready to unload and discharge the same, and the defendant wholly neglected and refused so to do for five days longer and more than he ought to have done according to his said promise ; and the plaintiffs were put to expense in and about the maintaining and keeping the master and crew of the said ship &c.

Plea.—That before the making of the said promise the plaintiffs, by another contract made by and between the plaintiffs and certain other persons, agreed with the said certain other persons, for certain freight therefore payable by the said other persons to the plaintiffs, to carry the said coals on a certain voyage in the said ship, and to deliver the said coals to the order of the said other persons, which contract was in full force thence, until and at the time of the making of the said promise and the delivery of the said coals. And the defendant says that before the making of the said promise, and after the making the said other contract, and while the last mentioned contract was in force, he bought the coals of the said other persons, who thereupon ordered the plaintiffs to deliver the same to the defendant, under and according to the said contract with the said other persons, of which the plaintiffs, before the making of the said promise, had notice. And the defendant says that the said order was in full force until and at the time of the making of the said promise, and thence until and at the delivery of the said coals, of which the plaintiffs always had notice. And the defendant says the then future delivery to the defendant of the said coals on the terms in the declaration mentioned, which was the consideration for the said promise, was the delivery of the said coals to the order of the said other persons, which the plaintiffs had by the said contract

with such other persons so agreed to make as aforesaid, and which before and at the time of the making of the said promise, until and at the time of the said delivery, the plaintiffs were, by, under and according to the said contract with the said other persons, bound to make as aforesaid. And the defendant says that there never was any consideration for his said promise other than the doing of that which by the said contract with the said other persons they the plaintiffs, before and at the time of the making of the said promise, and thence until the plaintiffs did it, were bound to do.

Demurrer and joinder therein.

Dowdeswell, in support of the demurrer.—The plea is bad. It admits a promise by the defendant to unload the coal at the rate of forty-nine tons a day; and the delivery of the same by the plaintiffs is a sufficient consideration to support the promise. The defendant, having made an express promise, is not relieved from his obligation to perform it because the plaintiff has entered into a previous contract with another person to deliver to his order. The defence would be available under the general issue; but the plea was allowed on the authority of *Shadwell v. Shadwell* (a). This is an attempt to question the decisions on this subject, which have been uniform from the time of *Jesson v. Solly* (b).

The Court then called on

C. Pollock, to support the plea.—There is no consideration to support the promise. The plea shews that the consideration alleged in the declaration is the doing that which the plaintiffs, by their contract with other persons, were bound to do. The charter-party only specifies the time and mode in which the cargo is to be discharged, as between the charterer and shipowner. [*Martin*, B.—You must establish

(a) C. B., M. T. 1860.

(b) 4 Taunt. 52.

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this, that if a person says to another, "The goods which I have in my ship are yours; but I will not deliver them unless you pay my lien for freight," which the latter agrees to do, the delivery of the goods is no consideration to support the promise to pay.] The cargo is the property of the defendant, and the agreement to deliver to him that which he was entitled to have was a nudum pactum. In Black. Com., vol. 2, p. 450, it is said:—"If a man buys his own goods in a fair or market, the contract of sale shall not bind him, so that he shall render the price, unless the property had been previously altered by a former sale."—[*Wilde, B.*—That is the case of a purchase of goods, the property in them being already in the purchaser; but here the plaintiffs will not deliver the cargo to the defendant, whereupon the defendant says, "If you will deliver it to me, I will discharge it in a certain manner.] The plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was void. Where a plaintiff discharged one of two joint debtors, it was held that a promise by a third person to pay the debt, in order to obtain the discharge of the other debtor, was void for want of consideration: *Herring v. Dorell* (a). So, if A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B., in consideration of B.'s releasing A. out of custody, is void: *Atkinson v. Settree* (b). [*Wilde, B.*—In those cases there was a legal right to the performance of the very act which was bargained for: it is not so here. *Martin, B.*—Suppose a man promised to marry on a certain day, and before that day arrived he refused, on the ground that his income was not sufficient, whereupon the father of the intended wife said to him: "If you will marry my daughter, I will allow you a 1000*l.* a year." Could not that contract be enforced?] There

(a) 8 Dowl. P. C. 604.

(b) Willes, 482.

would be no consideration for such a promise, the party being already under an obligation to marry. A promise by a captain to pay his sailors increased wages for performing their duty during a storm is void for want of consideration. [*Martin, B.*—That proceeds on the ground of public policy. *Wilde, B.*—It often happens that when goods arrive in a ship, and there is a lien upon them, a merchant who wants to get possession of the goods promises to pay the lien if the master will deliver them to him. A man may be bound by his contract to do a particular thing, but while it is doubtful whether or no he will do it, if a third person steps in and says, "I will pay you if you will do it," the performance is a valid consideration for the payment. *Martin, B.*—If a builder was under a contract to finish a house on a particular day, and the owner promised to pay him a sum of money if he would do it, what is to prevent the builder from recovering the money?] As the plaintiffs would be doing a wrong by not fulfilling their contract, it must be presumed that the prior legal obligation, and not the subsequent promise, was the motive for their delivery of the cargo.

MARTIN, B.—I am of opinion that the plea is bad, both on principle and in law. It is bad in law because the ordinary rule is, that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him. Here the benefit is the delivery of the coals to the defendant. It is consistent with the declaration that there may have been some dispute as to the defendant's right to have the coals, or it may be that the plaintiffs detained them for demurrage; in either case there would be good consideration that the plaintiffs, who were in possession of the coals, would allow the defendant to take them out of the ship. Then is it any

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answer that the plaintiffs had entered into a prior contract with other persons to deliver the coals to their order upon the same terms, and that the defendant was a stranger to that contract? In my opinion it is not. We must deal with this case as if no prior contract had been entered into. Suppose the plaintiffs had no chance of getting their money from the other persons, who might perhaps have become bankrupt. The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiffs had previously contracted with third parties to deliver to their order.

WILDE, B.—I am also of opinion that the plaintiffs are entitled to judgment. The plaintiffs say, that in consideration that they would deliver to the defendant a cargo of coals from their ship, the defendant promised to discharge the cargo in a certain way. The defendant, in answer, says, "You made a previous contract with other persons that they should discharge the cargo in the same way, and therefore there is no consideration for my promise." But why is there no consideration? It is said, because the plaintiffs, in delivering the coals, are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another. But if a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding. Here the defendant, who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. I accede to the proposition that, if

a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principle, it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.

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Judgment for the plaintiffs (a).

(a) *Pollock*, C. B., and *Channell*, B., were absent.

DE COSSE BRISSAC v. RATHBONE and Another.

Jan. 23.

DECLARATION.—That heretofore, in a certain suit then depending in the Courts of the new Empire of France, having competent jurisdiction to entertain and determine the said suit, and duly holden, in all matters relating to or connected with the said suit, within their jurisdiction, at the commencement of which said suit, the plaintiff and her husband then being alive, were in the same parties, along with others, as plaintiffs, and the defendants in this action were in the same parties, along with others, as defendants, such proceedings were duly, and according to the then laws of France aforesaid, had and maintained; that a final judgment in the said suit was, before the commencement of this action, duly, and according to the then laws of France aforesaid, pronounced, under and by virtue of

The judgment of a foreign Court, having jurisdiction over the parties and subject-matter of the suit, cannot be impeached on the ground that it is erroneous upon the merits.

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which said judgment, among other things, it was adjudged that the plaintiff in this action, her said husband then being dead, was entitled, according to the then laws of France aforesaid, alone and by herself, to have and claim, of and from the defendants in this action, and to be paid by them, to wit, in France aforesaid, a certain large sum of money, to wit, three hundred thousand francs, the same being equivalent in English money to, to wit, 12,000*l.*; and the defendants were ordered to pay the same to the plaintiff: which said judgment was, in all respects, valid and binding; and duly had, according to the then laws of France aforesaid, and was duly pronounced and made according to the said laws, and was the judgment of a Court having competent jurisdiction over the subject-matter of the said suit, and over the defendants in respect thereof, and acting in all respects within its jurisdiction. And the plaintiff says that, by virtue of the said judgment, the defendants, at the commencement of this suit, were, and still are, justly indebted to her in the said sum of 12,000*l.*; and the plaintiff says that, before and at the time of the commencement of this suit, all conditions precedent had been performed, and all things had happened and existed necessary, and all times had elapsed necessary to entitle the plaintiff to have and claim in England, of and from the defendants in this action, and to be paid by them, the said sum of money; but the defendants have not paid the same or any part thereof.

Third plea.—That the defendants are native born subjects of her Majesty the Queen, and were not, at the commencement of the suit in which the judgments hereinafter mentioned were pronounced, or at the time of making or pronouncing of the said judgments respectively, domiciled, or resident, or present, in France, nor were they at any time domiciled or resident in France, but were always

domiciled and resident in England. And the defendants further say that the said judgments were pronounced against them and one Richard Hall, as defendants in the said suit; and that they did not sue as plaintiffs in the suit in which the same were pronounced. And the defendants further say that judgment might have been signed against them in the said suit by default if they did not appear to the said suit, and that, at the time of the commencement of the said suit, they were possessed of property in France, which was, according to the law of France, liable to seizure in case they did not appear to the said suit, and in case judgment by default was signed against them. And the defendants further say that, in order to prevent their said property from being seized, they authorized an agent to appear for them as defendants to the said suit in France; and the defendants did thereupon appear, by such agent, and plead to the said suit in which the said judgments were afterwards pronounced, and the said judgments in the said suit were so obtained against the defendants and the said Richard Hall. And the defendants further say that the said judgment in the declaration mentioned is a judgment founded upon a former judgment of one of the said Courts of France, and is a judgment given in the same suit for the purpose of carrying out the said first mentioned judgment, and fixing the amount of damages for which the defendants were liable on the said first mentioned judgment. And the defendants further say, that the said first mentioned judgment and the said second mentioned judgment, so far as it is founded upon the first mentioned judgment, are erroneous, in fact and in law, upon the merits, and that such judgments ought to have been made and pronounced in favour of the defendants in this action and the said Richard Hall, and that such error does appear on the face of the said judgments respectively.

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The fourth plea only differed from the third in concluding with the allegation "that such error does not appear on the face of the said judgments."

The fifth plea, after stating, as in the third plea, that the defendants appeared, by their agent, and pleaded to the suit, proceeded thus:—And the defendants further say that the enforcement of the said judgment in England is contrary to natural justice on the following grounds:—That since the hearing of the said suit in which the said judgment was pronounced, and after the pronouncing of the said judgment, the defendants have discovered fresh evidence which was not known to them, or either of them, before the pronouncing of the said judgment, and which, with reasonable diligence, they could not have discovered before the pronouncing of the said judgment, and which said evidence shews and proves that the said judgment is erroneous, in fact and law, on the merits.

The sixth plea, after a similar statement that the defendants appeared and pleaded to the suit, proceeded thus:—And the defendants further say that the enforcement of the said judgment in England is contrary to natural justice on the following ground:—That the Court in which the said judgment was pronounced admitted, as evidence against the defendants, documents and letters made and passed between other parties, and to which the defendants were not parties or privies, nor was any or either of them party or privy, and which they did not, nor did any or either of them, authorize, acknowledge or sanction, and of which they had not, nor had either of them, any notice or knowledge, and that such documents and letters would not have been admissible as evidence against the defendants in England in a suit between the same parties; and that, if such documents and letters had not been admitted, the said judgment would have been pronounced in favour of the defendants.

Demurrers and joinders therein.

Bovill (*Holland* with him), in support of the demurrers. —The third plea alleges that the judgment is erroneous in fact and in law upon the merits; but a foreign judgment is not examinable upon the merits. The plea shews that both parties appeared before the French Court, and it is not denied that the Court had jurisdiction over the subject-matter of the suit. [*Channell*, B.—The plea does not shew of what the alleged error consists, or that the judgment is contrary to natural justice.] The plea merely says that the judgment is erroneous on the merits, but the tribunal which heard and decided the cause must determine the merits. Besides, does the plea mean that the judgment is erroneous according to the law of France or of England? If the former, how can this Court determine that question? If the latter, it should have been shewn how the law of England applied to the subject-matter of the suit. *The Bank of Australasia v. Nias* (a) is a conclusive authority against such a plea. That case established this principle, that although in an action on a foreign or colonial judgment the judgment is examinable to a certain extent, as for the purpose of shewing want of jurisdiction, or that the defendant was not summoned, or that the judgment was fraudulently obtained, yet such judgment is not examinable upon the merits, as for the purpose of shewing that the contract sued upon was not made, or was procured by fraud, or that the judgment was erroneous.—The same objections apply to the fourth plea, which is also bad on the ground that a foreign judgment cannot be impeached for error not apparent on the face of it.—The fifth plea alleges that since the judgment was pronounced the defendants have discovered fresh evidence, which they could not have discovered before; but, the French Court having pronounced judgment upon the evidence before them, their decision is final. In *Marriot*

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(a) 16 Q. B. 717.

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v. Hampton (a), Lord *Kenyon* said, "After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person."—The sixth plea alleges that the French Court admitted as evidence against the defendants certain documents which would not have been admissible in England; but the reception or rejection of evidence must be governed by the *lex fori*.

Hannen (*Quain* with him), in support of the pleas.—The question whether a foreign judgment can be impeached upon the merits is still a moot point: 2 *Smith's Lead. Cas.* 636. It is submitted that where an action is brought in this country on a foreign judgment against a party who is neither a native of nor domiciled or resident in the country in which the judgment is pronounced, that judgment is examinable upon the merits. These pleas state that the defendants were British subjects, and were not domiciled or resident in France, and that they merely appeared to the suit in order to prevent their property being seized. [*Wilde*, B., referred to *Inrie v. Castrique* (b).] *The Bank of Australasia v. Nias* (c) was an action on a colonial judgment, and the ground of that decision was that the judgment, if erroneous, might be examined and reversed on appeal to the Privy Council. The Court carefully abstained from expressing any opinion as to how far a defendant might impeach the competency or integrity of a foreign Court from which there was no appeal. [*Martin*, B., referred to *The Bank of Australasia v. Harding* (d).] The point there decided was, that members of a colonial Company are not discharged from liability, on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, and having received no notice of the proceed-

(a) 7 T. R. 269.

(b) 8 C. B., N. S. 405.

(c) 16 Q. B. 717.

(d) 9 C. B. 661.

ings. There also the defendant might have appealed to the Privy Council. [*Wilde, B.—Ricardo v. Garcias (a)* is an authority that the judgment of a foreign Court of competent jurisdiction cannot be impeached upon the merits.] A defendant sued in a foreign Court is in a different position from a plaintiff. A plaintiff chooses his tribunal, and if he is defeated he cannot question the merits in the Courts of this country. But a defendant is compelled to appear in the foreign Court in order to prevent his property being seized. This distinction is adverted to in the judgment in *The General Steam Navigation Company v. GUILLOU (b)*. In *Walker v. Witter (c)*, Lord Mansfield said, "Foreign judgments are a ground of action everywhere, but they are examinable." In Scotland a judgment of a foreign Court may be impeached on the ground that it has been irregularly or unduly obtained: *Sinclair v. Fraser (d)*. In *Galbraith v. Neville (e)*, Buller, J., said, "The doctrine which was laid down in *Sinclair v. Fraser* has always been considered as the true line ever since; namely, that the foreign judgment shall be *prima facie* evidence of the debt, and conclusive until it be impeached by the other party." [*Channell, B., referred to Cowan v. Braidwood (f)*.] That was an action on a Scotch decree, and the defence was that the defendant was not within the jurisdiction of the Court, and had no notice of the proceedings; but the plea was held bad for want of allegations shewing that the decree was not binding on him. In *Phillips v. Hunter (g)*, Eyre, C. J., speaking of a foreign judgment, said, "We examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, whether the judgment is warranted by that

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(a) 12 Cl. & F. 368.

(b) 11 M. & W. 877. 894.

(c) Dougl. 1.

(d) 20 How. Sta. Tr. 468.

(e) Dougl. 6, note.

(f) 1 Man. & G. 882.

(g) 2 H. Black. 403. 411.

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law."—He also referred to *Tarkton v. Tarkton* (a) and 2 Smith's Lead. Cas. 638.

MARTIN, B.—We are all of opinion that this question is so concluded by the authorities that it is impossible for us to decide contrary to them, and the case must go to a Court of error. I may observe that the question does not come before me for the first time: for many years past I have had occasion to consider it.

CHANNELL, B., concurred.

WILDE, B.—There is no book of pleading in which such pleas can be found.

Judgment for the plaintiff.

(a) 4 M. & Sel. 20.

GEORGE HAYWARD v. ISABELLA RAW and BATES.

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GEORGE HAYWARD v. CRUDEN.

A lord of a manor cannot recover a fine not certain, unless it is reasonable, and assessed and demanded.

A surrender of copyhold premises has a right to have in his admittance a description of the premises corresponding with that in the surrender.

IN the first mentioned case, the writ issued on the 4th of August, 1859, and was specially indorsed as follows:—

"The following are the particulars of the plaintiff's claim.—The amount of fines due from the defendants to the plaintiff as lord of the manor of Rishangles, with its members, in the county of Suffolk, the full particulars of which have been already delivered. £122 0 0"

The plaintiff declared for money payable by the defendants to the plaintiff as lord of the manor of Rishangles, in the

An entry by a steward of a manor in his book of the admission of a surrender of copyhold premises is a mere memorandum, and not such an admittance as will entitle the lord to claim a fine.

county of Suffolk, for fines due and of right payable by the defendants in respect of the surrender of certain copyhold tenements.—Plea: Never indebted.

The cause came on for trial before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1859, when a verdict was, by consent, entered for the plaintiff for 60*l.*, subject to the opinion of the Court on the following case:—

The plaintiff has been, since the 16th October, 1856, and still is, lord of the manor of Rishangles, in the county of Suffolk, and Frederick Hayward has been since that time, and still is, his steward.

The defendant Isabella Raw, Eliza the wife of the defendant Thomas Bates, and Sarah the wife of Thomas Conway, were the three daughters of Joseph Raw, who was the elder brother of Mary Raw, afterwards Mary Spooner, widow. The said Sarah died in the lifetime of her father, Joseph Raw; and Joseph Raw died in the lifetime of his sister, Mary Spooner.

Mary Spooner (formerly Mary Raw, spinster), a copyhold tenant of the said manor, died intestate as to the copyhold tenements mentioned in the declaration, to which she was admitted at a Court held for the said manor on the 4th January, 1822, upon the absolute surrender of one Charles Keen; and the defendant Isabella, the said Eliza, and Thomas Conway the younger, an infant, and the eldest son of the said Thomas Conway and Sarah his wife, are the co-heiresses and heir of the said Mary Spooner.

By a contract, dated the 31st October, 1825, and made between Mary Spooner (then Mary Raw, spinster), of the one part, and John Raw, deceased, of the other part, and the last will and testament of John Raw, the defendant Isabella, the said Eliza, and Thomas Conway the infant, became trustees of the said copyhold tenements for Thomas Raw, his heirs and assigns.

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William Watson, by an order of the Court of Chancery, made the 2nd December, 1856, was, on the petition of Thomas Raw, appointed in the place of Thomas Conway the younger, to convey his interest in the said copyhold tenements to Thomas Raw.

Thomas Raw directed the surrender hereinafter mentioned of the said copyhold tenements to be made to the use of Alexander Cruden, his heirs and assigns for ever, at the will of the lord and according to the custom of the said manor, upon trust for the said Thomas Raw, his heirs and assigns.

On the 16th December, 1856, P. Long, the solicitor for the surrenderors and for Thomas Raw, sent a letter to F. Hayward, the steward of the said lord, containing the following passage:—"Manor of Rishangles.—I presume I or my agent may take a surrender as your deputy in this manor, to Mr. Thomas Raw."

On the 17th December, 1856, the said steward sent the following answer:—"In reply to your letter received this morning, I beg to inform you that you or your agent may take surrender in this manor as deputy steward on payment of fine and deputation fees."

On the 30th December, 1856, the said P. Long sent to the steward the following letter in answer:—

"I propose to take the surrender for Miss Isabella Raw, Mrs. Bates and her husband, and Mr. Watson (appointed by the Court to convey and surrender for the minor Thomas Conway), as co-heirs of Mary Raw, deceased, to a trustee for Mr. Thomas Raw.

"They will pay a fine on such surrender, and the usual fees on surrender only, admittance being unnecessary. Mr. Raw's trustee, it is proposed, shall be admitted, and most probably he will enfranchise. Be kind enough to let me know what fine you will require on the surrender by the co-heirs."

On the 14th March, 1857, the said P. Long sent the following letter to the steward:—

“I send your surrenders herein; please return me copy with your receipt for the original. I have indorsed it, so that you have only to sign it. The surrender sets out all the facts of the case, and will be in itself instructions for the admission of Mr. Cruden. I shall be glad to have your views as to the account of fines, as also the enfranchisement.”

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The surrender, dated the 13th February, 1857, was duly made and executed by the defendants, Isabella Raw and Thomas Bates and Eliza the wife of the defendant Thomas Bates, the said William Watson as trustee, and the said Thomas Raw, and was sent with P. Long's letter of the 14th March, 1857, to and received by the said steward (a).

(a) A copy of the surrender was set out in an appendix to the case, and was as follows:—

“The Manor of Rishangles, with its Members.

“Whereas, Mary Spooner, widow, formerly Mary Raw, spinster, a copyhold tenant of the said manor, lately died intestate as to the hereditaments, copyhold of the said manor, to which she stood admitted at the time of her decease and hereinafter expressed to be surrendered. And whereas Isabella Raw of &c., and Eliza the wife of Thomas Bates of &c., formerly Eliza Raw, spinster, two of the daughters of Joseph Raw formerly of &c., the elder brother of the said Mary Spooner, and who died in her lifetime, and Thomas Conway the younger, an infant of the age of fifteen years, and the eldest son of Thomas Conway of &c. and Sarah his wife, who was also a daughter of the said Joseph Raw, deceased, and died in his lifetime, are the co-heiresses and heir of the said Mary Spooner, deceased. And whereas, under and by virtue of a certain contract or agreement, bearing date on or about the 31st day of October, 1825, and made between the said Mary Spooner (then Mary Raw, spinster), of the one part, and John Raw therein described of the other part, and of the last will and testament of the said John Raw, the said Isabella Raw, Eliza Bates and Thomas Conway the younger have become trustees of the said copyhold hereditaments for Thomas Raw of &c., his heirs and assigns. And whereas by an order of the High Court of Chancery made on or about the 2nd day of December last past, in the matter of the estate of Mary Spooner, deceased, and in the matter of ‘The Trustee Act, 1850,’ it

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On the 23rd April, 1857, the steward sent a letter to the

was on the petition of the said Thomas Raw ordered that William Watson of &c., in the petition named, be appointed in the place of the said infant, Thomas Conway the younger, to convey all such share as was then vested in the said infant, Thomas Conway the younger, of and in the freehold and copyhold hereditaments and premises comprised in the said contract of the 31st day of October, 1825, and in the devise to the said petitioner, Thomas Raw, contained in the will of the aforesaid John Raw, to the petitioner Thomas Raw, or as he should direct, for all the estate and interest of the said infant, Thomas Conway, therein. Now be it remembered, that on the several days expressed in the captions at foot hereof, the said Isabella Raw, the said Thomas Bates and Eliza his wife and the said William Watson came before the several persons whose signatures are written to the said respective captions, and whose names, residences and descriptions are written at foot hereof, and being respectively deputy stewards, for the purposes hereinafter expressed, of Frederick Hayward, chief steward of the said manor; and she the said Eliza Bates having been by the deputy steward in that behalf expressed, first examined separate and apart from her said husband, touching and concerning her free and voluntary consent to the making and passing the surrender hereinafter expressed, and freely and voluntarily consenting thereto as by law required, and having satisfied to the lord his fine, did out of Court in pursuance of the premises and by the direction of the said Thomas Raw (testified by his signature at the foot hereof) and in consideration of the sum of 300*l.*, the apportioned part of the consideration money or sum of 600*l.* to the said Mary Spooner, deceased, paid as in the aforesaid contract mentioned, and the residue whereof is apportioned as the consideration money in respect of certain freehold hereditaments, as mentioned in a conveyance thereof, bearing even date herewith, &c.; and also in consideration of 10*s.* to each and every of them the said Isabella Raw &c. paid by the said Alexander Cruden at or before the passing the surrender hereinafter expressed, the receipt of which sum is hereby acknowledged, and as to the said William Watson in pursuance of and obedience to the said order, surrender out of their and each and every of their hands into the hands of the lord of the said manor by the hands and acceptance of me the said steward, by the rod, according to the custom of the said manor, one messuage or cottage with four and a half acres of land of the tenement Millard, with a certain way, called Ingham Way on the part of the East; and one acre of land formerly built of the tenement Bases; and three acres of land, with a certain piece of pasture, containing half an acre, lying together between lands of the Rectory of Rishangles on the part of the East, and lands called Bases on the part of the West, one head whereof abutteth upon the common highway towards the South, and the other head upon a meadow of the

said P. Long inclosing the lord's claim for fines (a) and his own for fees. To these fines and fees, P. Long, on behalf

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lord, called Ingham Meadow, in part, and upon a wood of the lord towards the North; and one messuage formerly built, and three acres of the tenement Bases, lying in Rishangles between lands of the lord of this manor, sometime since in the tenure of Henry Mithall in right of his wife, called Shortland, on the part of the West, and abutting upon the highway towards the South, and upon the customary lands formerly in the tenure of Richard Chittoke, afterwards of Thomas Hasell, towards the North, which premises are holden by copy of Court roll of the said manor, and which Charles Keen took up to him and his heirs with other hereditaments at a Court held for the said manor on the 1st day of August, 1812, and the said Mary Spooner, deceased (by her then name of Mary Raw), took up to her and her heirs at a Court held on the 4th day of January, 1822; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof; and also all the estate, right, title, interest, inheritance, use, trust, property, possession, power, claim and demand whatsoever both at law and in equity or otherwise howsoever of them the said Isabella Raw, Thomas Bates and Eliza his wife, and William Watson, and also of the said Thomas Conway the younger, the infant, of, in, to, or out of the said hereditaments and premises hereby surrendered, or expressed or intended so to be with the appurtenances: To the use and behoof of the said Alexander Cruden, his heirs and assigns for ever, at the will of the lord and according to the custom of the said manor, Upon trust, nevertheless for the said Thomas Raw, his heirs and assigns.

(The respective captions of the parties were duly stated.)

"Isabella Raw,
"Thos. Bates,
"Eliza Bates,
"William Watson."

(a) The account inclosed was as follows:—

"1857, Feby. "Manor of Rishangles.

"Fine on surrender of Isabella Raw and two others (trustees of Mary Spooner, deceased,) to Mr. Cruden, of two messuages and outbuildings and several pieces of land, containing by old survey 16 a. 0 r. 26 p.

	£	s.	d.
" 1st Life - - - - -	70	0	0
" 2nd Life - - - - -	35	0	0
" 3rd Life - - - - -	17	10	0
" Fine on Mr. Cruden's admission -	70	0	0
	192	10	0
" Reliefs - - - - -	8	0	
	192	18	0
" Fees - - - - -	22	1	9
	£214	19	9"

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of Thomas Raw, objected on the grounds stated in a letter (a) of the 16th May, 1857.

According to the custom of the manor, a fine is due and payable to the lord on admission of the heir, and the amount of such fine is arbitrary.

In copy of Court rolls of the said manor the following entry appears:—

(a) This letter was as follows:—

“Rishangles.

“I have the following objections and observations to make as to these fines and fees. First, as to the fines,—With respect to the $\frac{1}{2}$ and $\frac{1}{4}$ fine for the second and third life, there is not the least shadow of right to the claim. The fine payable on acceptance of the surrender, is on a surrender from co-heirs who take in co-parcenary, and between whom there is no survivorship. The $\frac{1}{2}$ and $\frac{1}{4}$ fine would only be due in respect of joint tenants, who have a survivorship. Had the co-heiresses been admitted the lord could only have claimed a fine from each in respect of her share.

“Next, as to the amount of fine.—The general plan is to calculate a death fine at $1\frac{1}{2}$ years value. A fine on surrender, as in Mr. Cruden's case, at $1\frac{1}{2}$ years value.

“Now there are only 12 acres of copyhold instead of 16 acres as charged by you, and I find the rent of the whole 15 acres, freehold and copyhold, of which the farm consists is within a fraction of 25s. per acre.

	£	s.	d.
“ Take therefore 12 acres of copyhold at 25s. per acre	-	15	0 0
“ 3 tenements, actual rents	-	11	10 0
		<u>£26</u>	<u>10 0</u>
“ Deduct land tax	-	1	6 10
“ Quit rent	-	0	13 10
“ Repairs—say per annum at least	-	3	14 4
		<u>5</u>	<u>15 0</u>
		<u>£20</u>	<u>15 0</u>
“ The fine therefore on the surrender	-	36	6 3
“ Do. on the admission	-	31	2 6
Total	-	<u>£67</u>	<u>8 9</u>

“That amount I have no objection to recommend Mr. Raw to pay.

“As to the fees,” &c. (here follow observations as to amount of fees, &c., which it is unnecessary to set out).

“F. Hayward, Esq.”

“Yours faithfully,

“Peter Long.”

"4th May, 1792.—John Butt as nephew and heir of Timothy Butt surrenders, without admission, to Lady Harland. Fine

paid on surrender by John Butt the	£	s.	d.
nephew, without admission	-	-	22 6 3
Fine for Lady Harland	-	-	22 6 9"

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In the months of June and September 1857, the said steward had several conferences with P. Long upon the subject of the fine due and payable in respect of the said copyhold tenements, surrendered by the defendants and others (an account of which had been delivered to him); but the quantum of the fine was not then agreed upon between them, the quantity of land in respect of which the fine was payable being disputed.

On the 27th July, 1858, a notice by the lord of the manor, demanding immediate payment of 122*l.* for the fine payable on surrender, was served on the defendants.

After some further negotiation, an offer was made by S. Smith (who acted on behalf of the defendants and A. Cruden) to pay 120*l.* for the fines and 15*l.* for the steward's fees, in respect of the surrender and the admission of the said A. Cruden, which offer the plaintiff accepted.

On the 14th July, 1859, S. Smith wrote to the steward a letter containing the following passages:—"I must be excused for not remitting the amount of fine and fees until I see that the admission is in accordance with the entries on the Court rolls and with the last surrender (*i. e.*) that 'it is limited to the 12 acres of copyhold. I hold the receipt at your disposal until, by your sending up the admission as above, I am enabled to complete the business."

The said S. Smith, on the 25th July, 1859, called on the steward's agents and handed to their clerk a draft for 135*l.* in exchange for a stamped copy of A. Cruden's admission, which the said S. Smith inspected and declined to take in

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the form in which it had been prepared, on the ground that it did not follow the surrender and contained an inaccurate description of the property, and that it ought not to have contained any reference to the alleged survey of 1724; and the said clerk at his request returned him the draft for 135*l*.

The draft for 135*l* was for the following sums:—

|                                         |            |
|-----------------------------------------|------------|
| For fine on surrender by the defendants | £60        |
| For fine on A. Cruden's admission       | - 60       |
| For steward's fees                      | - - - 15   |
|                                         | <hr/> £135 |

The description of the copyhold tenements in the surrender is a very ancient one, and such copyhold tenements have in all admissions and acts of Court for the last 200 years and upwards (where a particular and not a general description is given) been known and described by the same ancient description without any variance as to quantity, names or tenancy.

It has been agreed between the parties, that if the plaintiff recover any fine in this action the amount of the same shall be 60*l*.

The question for the opinion of the Court, upon such of the facts herein stated and documents referred to as shall be deemed admissible in evidence, is whether the plaintiff is entitled to recover from the defendants the said sum of 60*l*. If yea, the verdict which has been entered for the plaintiff is to stand for that sum. If nay, a verdict is to be entered for the defendants.

The Court to be at liberty to draw any inferences of fact.



## GEORGE HAYWARD v. CRUDEN.

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In this action the writ was issued on the 4th August, 1859, and was specially indorsed as follows:—

“The following are the particulars of the plaintiff’s claim.—The amount of fine due from the defendant to the plaintiff as lord of the manor of Rishangles, with its members, in the county of Suffolk, the full particulars of which have already been delivered. } £70”

The plaintiff declared for money payable by the defendant to the plaintiff as lord of the manor of Rishangles, in the county of Suffolk, for fines due and of right payable in respect of the admission of the defendant to certain copyhold tenements.—Plea: Never indebted.

The cause came on for trial before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1859, when a verdict was, by consent, entered for the plaintiff for 60*l.*, subject to the opinion of the Court on the following case.—(The case stated the facts mentioned in the case of *Hayward v. Raw*, with the following additional facts.)

Frederick Hayward, being duly sworn and examined as a witness on the trial of this cause, stated that he in pursuance of the instruction for the admission contained in P. Long’s letter of the 14th March, 1857, admitted the defendant as copyhold tenant, and that such admission was made out of Court by the rod, according to the custom of the said manor. That he nominated John Hayward, in the absence of the defendant, to receive admission by the rod, according to the custom of the said manor, and admitted him for the defendant.

On cross-examination, the said Frederick Hayward stated that John Hayward was his clerk and son. That he gave no express notice of the nomination of John Hayward to



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the defendant. That by the custom of the manor, the steward delivers the rod to the person who represents the surrenderee, as he did in this case to John Hayward for the defendant.

That the minutes marked B. in the appendix (a) were the original entries made by him as steward, and also signed by the said John Hayward at the time of the said admission.

That the draft admission marked C. in the appendix (b)

(a) Minutes marked B. in the appendix.

"The manor of Rishangles, }  
 with its Members. } The 22nd day of April, 1857.

"Whereas, on the 13th day of February, 1857, Isabella Raw, Thomas Bates and Eliza his wife, and William Watson, appointed by the Court of Chancery for Thomas Conway the younger, an infant, the eldest son of Thomas Conway and Sarah his wife, and which said Isabella Raw, Eliza Bates, and Sarah Conway were the three daughters and co-heiresses of Joseph Raw, who was the eldest brother of Mary Spooner (late Mary Raw), a copyhold tenant of the said manor who died intestate, out of Court, surrendered

"One messuage or cottage with 4½ acres of land of the tenement Millard," &c. [The copyhold tenements were here described in precisely the same manner as in the surrender (*ante*, p. 311).]

"(To which premises it is recited the said Mary Spooner (then Mary Raw) was admitted at a Court held the 4th January, 1822.)

"To the use of Alexander Cruden, of &c., his heirs and assigns; Upon trust nevertheless for Thomas Raw, his heirs and assigns.

"Now be it remembered, that on the day and year first above written the said Alexander Cruden (by John Hayward his attorney) comes before me, Frederick Hayward, gentleman, steward of the said manor, at my office situate in Needham Market in the county of Suffolk, and prays to be admitted tenant to the premises so surrendered to him as aforesaid. And the said Alexander Cruden is (by his said attorney) admitted tenant thereto accordingly: To hold to him the said Alexander Cruden, his heirs and assigns; Upon trust nevertheless for the said Thomas Raw, his heirs and assigns, according to the form and effect of the said surrender of the lord, at his will and according to the custom of the manor; and he pays to the lord a fine, &c. And his fealty is respited," &c.

"John Hayward,

"Attorney for the said Alexr. Cruden."

(b) Draft admission marked C. in the appendix.

"The manor of Rishangles, }  
 with its Members. } The 22nd day of April, 1857.

"Whereas it is certified to Frederick Hayward, gentleman, steward



was made up and taken from the said entries, and a copy thereof was made on a proper stamp for the defendant before

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of the said manor, that an absolute surrender was made and passed by the several persons and at the several times and in manner in the said surrender mentioned, of the messuages, lands, and hereditaments hereinafter described and holden by copy of Court roll of the said manor, which surrender is in the words following :—

“The Manor of Rishangles,” &c. [Here follows an exact copy of the surrender (*antè*, p. 311,) with all the signatures and attestations.]

“Now be it remembered, that on the day and year first above written, the said Alexander Cruden, by his attorney, came before the said Frederick Hayward, steward of the said manor, out of Court, and prayed the favour of the lord of this manor to admit him tenant to all and singular the said messuages, lands, and hereditaments so surrendered to him as aforesaid (which said messuages, lands, and hereditaments), according to a survey and admeasurement made and taken thereof in the year 1724, are described as follows, namely,—One messuage with the yards, orchards, and garden; and one pightle of pasture with a way called Ingham's Way; and three inclosures of land, meadow and pasture, estimated together at 9 acres, lying in Rishangles, as between the copy lands of Michael Marner, called Shortland, on the part of the North, and the lands of the Rectory of Rishangles, on the part of the South, abutting upon the highway, alias Church Green, towards the West, and upon the piece next mentioned in part, and the lord's meadow called Ingham's in part, towards the East; containing together by measure 11 a. 2 r. 18 p. And also one inclosure of arable land, estimated at 3 acres, lying in Rishangles between the copy lands of Mr. Little on the part of the North, and Ingham's Meadow aforesaid on the part of the South, abutting upon Rishangles Wood towards the East, and upon the lands last abutted towards the West; containing by measure 3 a. 2 r. 8 p.; which said parcels of land before mentioned are held by the several rents amounting in the whole to 11s. 10d. per annum: To which said Alexander Cruden the lord of this manor by the said steward did grant and deliver seisen thereof by the rod: To hold the same messuages, lands, and hereditaments, with their appurtenances, unto the said Alexander Cruden, his heirs and assigns, for ever, according to the form and effect of the said surrender of the lord of this manor, at the will of the lord and according to the custom of this manor, by the rents and services therefore due and of right accustomed: Upon trust nevertheless for the said Thomas Raw, his heirs and assigns. And the said Alexander Cruden giveth the lord a fine, and is by his attorney admitted tenant thereto, saving the right of every one &c., but his fealty is respited until,” &c.

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this action was brought, but the entry thereof in the Court books was not made till after action brought.

That, according to the custom of the manor, the steward at the time of taking the admission of a copyhold tenant, makes an entry or minute of such admission from which the Court rolls are afterwards made up.

No express notice of the nomination of John Hayward to receive admission for the defendant was ever given to the defendant, or any one on his behalf; nor had the defendant, or any one on his behalf, any express notice that the said minutes of the said alleged admission, or the said draft admission, had been made before the trial of this cause, save as appears by the case and correspondence.

According to the custom of the manor, a fine is due and payable to the lord on the admission of the copyhold tenant, and the amount of such fine is arbitrary.

(The question for the opinion of the Court was the same as that in *Hayward v. Raw* (a), and the Court was at liberty to draw inferences of fact.)

*Baylis*, for the plaintiff.—The plaintiff, as lord of the manor, is entitled to maintain his verdict for the fine in respect of the surrender of Mary Spooner. First, the fine was due to the lord upon surrender, without admittance. In *Scriven on Copyholds*, vol. 1, p. 290, 4th ed., it is said, "The customary heir of a copyholder, being a complete tenant before admittance against all persons but the lord, may enter and take the profits, and maintain trespass and bring ejectment without having been admitted, and even surrender on payment of the lord's fine." In *Brown's Case* (b) it was resolved "that, where the customary estate of inheritance descends to the heir before admittance, he may enter and take the profits." The difference between

(a) *Ante*, p. 316.

(b) 4 Rep. 21 a.



admittance on surrender and admittance on descent is thus pointed out in Coke's Complete Copyholder, Sect. 41, p. 111: "In admittances upon surrender nothing is vested in the grantee before admittance, no more than in the voluntary admittances; but in admittances upon descents the heir is tenant by copy immediately upon the death of his ancestor; not to all intents and purposes, for peradventure he cannot be sworn of the homage before, neither can he maintain a plaint in the nature of an assise in the lord's court before, because till then he is not complete tenant to the lord, no further forth than the lord pleaseth to allow him for his tenant. And therefore if there be grandfather, father and son, and the grandfather is admitted and dieth, and the father entreth and dieth before admittance, the son shall have a plaint in the nature of a writ of Ayel, and not an assise of mort d'auncestor. So that to all intents and purposes the heir, till admittance, is not complete tenant; yet to most intents, especially as to strangers, the law taketh notice of his as a perfect tenant of the land instantly upon the death of his ancestor; for he may enter into the land before admittance, take the profits, punish any trespass done upon the ground, surrender into the hands of the lord to whose use he pleaseth, satisfying the lord for his fine due upon the descent." That doctrine was recognised and adopted in *Regina v. Dullingham* (a), which is an authority that a fine is payable by the heir on descent, before admittance. The lord has no power to compel the surrenderee to be admitted, for he is a perfect stranger; and as the surrenderee has no interest before admittance he is not capable of forfeiting the copyhold by committing felony, but upon his death it descends to the heir of the surrenderor: *Roe d. Jeffereys v. Hicks* (b).—Secondly, the entries and minutes made by the steward in his book, and signed by the person

(a) 8 A. &amp; E. 858.

(b) 2 Wils. 13.

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appointed to receive admissions for the surrenderee, were a sufficient admittance to entitle the lord to his fine. A surrender and presentment may be proved by a draft of an entry produced from the muniments of the manor, and the parol testimony of the foreman of the homage who made such presentment, although no entry thereof appears on the Court rolls: *Doe d. Priestley v. Calloway* (a). There Lord Tenterden referred to several cases for the purpose of shewing that the entry on the roll is not conclusive on the parties, and he observed that "in another case words were added to the roll to pass other lands." [*Martin*, B.—These entries were nothing more than a memorandum made by the steward in his book.] A draft admission was afterwards made up from them, and a stamped copy delivered to the solicitor of the surrenderee. [*Martin*, B.—The surrenderee applies to be admitted to the copyhold premises by the description used for years, and thereupon the steward alters the document and admits him by a new description: that is no admission.] In *Scriven on Copyholds*, vol. 1, p. 283, 4th ed., it is said, "Where the right of alienation is established by the custom of the manor, the admittance is more of form than of essence, and the surrender is deemed to be the substantial part of the conveyance." Again, p. 291, "The admittance is merely as between the lord and tenant; if therefore the customary heir should die before admission his heir might enter." In *Coke's Complete Copyholder*, Sect. 40, p. 105, it is said, "If the surrender be conditional and the presentment be absolute, both the surrender, presentment and admittance thereupon are wholly void. But if the conditional surrender be presented, and the steward, in entering it, omitteth the condition, yet, upon sufficient proof made in Court, the surrender shall not be avoided, but the roll amended; and this shall be no conclusion to

(a) 6 B. & C. 484.



the party to plead or give in evidence the truth of the matter. *Towers v. Moor* (a) is also an authority that parol evidence is admissible to explain a surrender of copyhold land, and shew a mistake either in the land or uses. A steward of a manor is not bound to accept a general surrender of tenements, although the proposed surrender refers to a previous surrender, in which there was a description of the tenements: *Regina v. Bishop's Stoke* (b).—Thirdly, as to the reasonableness of the fines. Where a fine arbitrary is imposed, it is due to the lord of common right, and it is for the tenant to shew that it is unreasonable: *Doe d. Twining v. Muscott* (c), *Denny v. Lemman* (d). The reasonableness of the fine, if the lord and tenant cannot agree, must be determined on action brought: *Willowe's Case* (e).—He also referred to *Long v. Collier* (f).

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*Manisty* (*Hannen* with him), for the defendants.—There is no contract upon which the lord can succeed either in the action for a fine upon surrender, or in the action for a fine upon admittance. No fine was payable upon the surrender: a fine would only become payable on admittance; but there never was any. The defendant, Cruden, never gave any authority, either express or implied, to J. Hayward to receive admission for him, and the act of the steward, in making admission by proxy, is of no avail until adopted. In *Scriven on Copyholds*, vol. 1, p. 292, it is said:—"It is usual to admit the heir or surrenderee or devisee by attorney, and not to put the party to the expense of appointing one by deed, if admittance be the only object, as the Court may name any person present to act for him, and

(a) 2 Vern. 97.

(b) 8 Dowl. P. C. 608.

(c) 12 M. &amp; W. 832.

(d) Hob. 135.

(e) 13 Rep. 1.

(f) 4 Russ. 267.



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to receive which in his behalf: but his assent must be shown by payment of the fine assessed by the lord or other act." *Gilbert, C. R.*, in his *Law of Tenures* 1, says:—"It is said to be resolved, that a copyholder cannot surrender by assent without deed: *Pratt, Reg. 136*. but that he may be admitted by assent without deed. Quere of this." Where, indeed, the heir was killed and a neighbour came and was admitted in his name, and the heir returned and consented to the admittance by bringing an action against another, it was held to be a good admittance: *Blount v. Clark* 1. Here there has been no consent to the admittance. [*Martin, B.*—The steward has never done that which he ought. He has performed only a portion of the entire transaction: there could be no admission until he made a memorandum, containing a description of the property corresponding with that in the surrender: and no fine is payable until the admission is entered on the Court rolls. [*Wilde, B.*—Suppose the roll is never made up.] A person is not tenant by copy of Court roll until his name is on the roll. A tenant has a right to have the evidence of the Court rolls, or a certified copy. [*Wilde, B.*—In olden time, a copyhold tenant paid his fine when he went to be admitted, and the roll was the evidence of his admission.] But, even assuming that there was an admission, the lord cannot recover the fine. There was no contract by the defendants to pay the amounts claimed. The lord is only entitled to a reasonable fine. It must be assessed, and a time and place must be appointed for payment, otherwise he cannot recover it or proceed for a forfeiture: 1 *Scriven on Copyholds*, p. 354, 4th ed. The only fines assessed were 122*l.* and 70*l.*, which are unreasonable fines. The jury having found that the lord is not entitled to the

sums claimed, he cannot retain the verdict for the sums actually due, but must make a new assessment: *Lord Northwick v. Stanway* (a).

The Court then called on

Baylis, who replied.

MARTIN, B.—We are all of opinion that the defendants are entitled to judgment. For my part, I think they are entitled to it on both points. The last is more a matter of form, the first is matter of substance; and Mr. *Manisty* has satisfied me upon both. The facts are these:—Mary Spooner, a widow, was the owner of certain copyhold premises in the manor of Rishangles. She died intestate, and the copyhold premises descended to two co-heiresses and an heir who was a minor. They were in fact trustees for one Thomas Raw, and he desired that these copyhold premises should become vested in one Cruden as trustee for him. A correspondence took place between the solicitor for the surrenderors and Thomas Raw, and the steward of the manor, as to taking the surrender. On the 14th March, 1857, the solicitor wrote to the steward as follows.—(His lordship read the letter, *antè*, p. 311.) The document sent with this letter was the surrender, a copy of which is set out in the appendix of the case (b), and which was duly executed by all parties. The surrender states at length what was its object; and that the parties, having satisfied the lord his fine, by the direction of Thomas Raw and in consideration of 300*l.*, did surrender the copyhold premises into the hands of the lord, according to the custom of the manor, to the use of Cruden, his heirs and assigns, for ever, in trust for Thomas Raw. The object of the surrender was that Cruden should be admitted tenant of the

(a) 3 Bos. & P. 346.

(b) *Antè*, p. 311, note.

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copyhold premises; and all that took place was only a mode of arriving at that final conclusion. The next step was, that the steward nominated John Hayward, his clerk in the absence of Cruden, to receive admission for him, by the rod, according to the custom of the manor. At the time that took place certain minutes or entries were made by the steward in his book and signed by John Hayward, and a draft admission was made up from those entries, together with a copy for the defendant on a proper stamp. Now, if this document had been correctly drawn up and had been inserted on the Court rolls, there would have been a complete admission of the surrenderee, which would have entitled the lord to his fine. It was argued by Mr. *Baylis* that where, by the custom of the manor, a fine is due on descent, in the event of the heir coming in and surrendering, the lord is entitled to his fine before admission. But here it is not pretended that the surrenderee was liable to pay the fine except upon the transaction being effected which it was proposed to carry out. I agree with my brother *Wilde*, that if the entry in the book of the steward had been a complete document, the right of the lord would have attached upon the entry of that document; but I require to be satisfied that a document entered by a steward in his book and signed by a person nominated by him, and of which nomination the surrenderee has had no notice, is anything more than a private memorandum, or that it will impose upon the surrenderee any obligation to pay a fine. The surrenderee was entitled to an admission in accordance with the surrender, but instead of that the document relied upon as giving a title is a different document, describing premises of which the copyhold tenant never had the benefit; and I think that the surrenderee acted rightly in refusing an admission in that form. Therefore, upon the merits, I am of opinion that, before the lord had any right to a fine,

the person acting for him ought to have delivered to the surrenderee an admission which he was bound to accept, and, not having done so, the lord has no right to a fine. I further think that the document cannot be considered as a copy of Court roll. *Littleton* (sect. 75, p. 60 *a*), says:—“And these tenants are called tenants by copy of Court roll; because they have no other evidence concerning their tenements, but only the copies of Court rolls.” From which it appears (and there is no better authority on the subject) that a copyholder ought to have his copy of Court roll, and that the surrenderee is entitled to a correct copy before he is liable to pay any fine. Therefore, in my judgment, upon the substance of the case the plaintiff fails.

I am also of opinion that the plaintiff fails on the other part of the case, because the right of the lord to a fine arises upon assessment, and that must be of a sum legally payable. Whatever right the lord may have upon the fine being properly assessed, he must fail upon a quantum meruit. A fine is a certain, fixed and legal sum *assessed*. Here the lord has not assessed any sum which is legal.

CHANNELL, B.—I am also of opinion that the defendants are entitled to judgment. I come to that conclusion because I concur in the last observation of my brother *Martin*. It is clear from the case of *Grant v. Astle* (*a*), that, to entitle the lord to a fine not certain, it must be reasonable and assessed and demanded. Whatever alteration there may be in the language of pleading, it can have no effect in altering the law; and if the form of pleading as found in the old books be referred to, it will be found that the declaration is for a “reasonable fine duly assessed, and due and payable.” If that be the correct view of the law, the plaintiff is not entitled to recover. The case might be different if

(*a*) 2 Doug. 722.

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I could see that a sum exceeding 60*l.* would be a reasonable fine, but we are at liberty to draw inferences of fact, and on consideration of all the circumstances stated in the case I have come to the conclusion that 122*l.* and 70*l.* are unreasonable fines. It is said that the defendants are bound to shew that the fines are unreasonable, and that the onus of proof is on them. I am not prepared to adopt that argument. Although the objection may assume somewhat of a technical character, I have the less hesitation in dealing with it, because the lord never declared his intention to rely on the entries or memorandum made by the steward in his book, and which it is now said is an admittance, but only on the draft admission, a copy of which was sent to the attorney of the surrenderee and objected to as insufficient.

Another point was raised, viz., assuming that the fines were properly assessed and demanded, whether they were payable. Upon that point I do not propose to give any opinion, because the other is sufficient for the decision of the case; and I should not have adverted to it except for the purpose of observing that the entry by the steward in his book might possibly have the effect of an admittance *as regards third parties*, and until the roll was perfected. Upon that point however it is not necessary to express an opinion, because here no question arises with respect to third parties.

WILDE, B.—I am also of opinion that the defendants are entitled to judgment. A fine not certain, in order to be recoverable, must be reasonable and assessed, and demanded; and the conclusion which I have come to from the facts stated in these cases is, that the fines claimed are unreasonable. There was a distinct assessment of two fines, one of 122*l.*, the other of 70*l.*; a correspondence took place on the subject, and at length the lord was willing

to accept two fines of 60*l.* each. The lord then brings these actions, and in his particulars of demand he claims the fines of 122*l.* and 70*l.*, but since he cannot establish his right to those sums he fails altogether.

With respect to the other point, I concur in the observations of my brother *Martin*, though upon the question whether, if the entry in the steward's book had been a complete document, there would have been a legal admittance of the surrenderee, I give no conclusive opinion. The lord is asked for a copy of the admittance in respect of which he claims the fine, and he sends a copy of that which alone can be an admittance, and it is rejected on the ground that it does not correspond with the surrender. The lord then sets up, as an admittance, an entry in the steward's book corresponding with the tenant's right, but of which he never had any notice. Upon these facts stated in the case, I think that the lord is not entitled to recover the fines.

Judgment for the defendants.

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DECLARATION.—For that the defendant having undertaken to duly erect and construct a builder's scaffold for the purpose of facilitating the demolition of certain buildings, yet he the defendant so carelessly and negligently erected and constructed such scaffold that the plain-

A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant while using it, from its defective state, if the lender was not aware of it.

The defendant, a builder, had purchased a house which he pulled down with the exception of a party wall. For his own use he erected a scaffold. P. asked him for the job in pulling down the party wall, and a written agreement was entered into by which P. agreed to do it for 17*l.* No mention was made in the agreement or otherwise of the use of the scaffold, but the plaintiff was aware that it was afterwards used by P. P. employed the plaintiff to pull down the party wall, and whilst doing so one of the putlogs, which was rotten, broke, and the plaintiff was thrown to the ground and seriously injured. The defendant was not aware of the defect in the putlog.—*Held*, that the defendant was not liable.

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tiff, who was lawfully working thereon, was exposed to unreasonable risk, the scaffold broke and gave way, and the plaintiff was suddenly precipitated and thrown therefrom to the ground, whereby the plaintiff fell from a height of thirty feet, and had not only his arm broken in divers places but also divers of his ribs broken, &c.

Pleas.—First: not guilty. Secondly: that the defendant never undertook to erect or construct the supposed scaffold as alleged.—Issues thereon.

At the trial, before *Wilde*, B., at the Middlesex Sitting in last Trinity Term, the following facts appeared.—The defendant, who was a builder, had purchased a house in Rood Lane in the city of London, which, being in a dilapidated condition, he had pulled down, with the exception of a party wall on the south side. This party wall was afterwards found to be defective, and the district surveyor required the defendant to take it down. As a scaffold would be necessary in building a new party wall, the defendant determined to erect one in the first instance, in order that his men might have the benefit of it in pulling down the party wall. The defendant had nearly erected the scaffold, when one Portlock, who had worked for him, applied for the job in pulling down the party wall. The defendant consented, and the following agreement was entered into:—

“I, the undersigned, do agree to pull down the party wall of house, Rood Lane, level to street, the remainder of party wall to be left standing.

“To dig out and cart away the ground, 25 feet long 4 feet wide and 3 feet deep, from the cellar floor.

“To clean away and stack on the premises all good brick and cart away the rubbish.

“The whole to be done for the sum of 17*l.* cash.

“John Portlock.

“24 Octr. 1859.

“23, Johnson Street, Shadwell.

"The wall to be pulled down to the foundation 25 feet from the front, and the ground excavated 3 feet below the line of the cellar floor, and 4 feet wide.

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" John Portlock."

" To Mr. Young."

On the following day Portlock employed the plaintiff, who was a labourer, to pull down the party wall. Portlock said to the plaintiff "there is a scaffold rigged for you, go to work." The plaintiff commenced pulling down the party wall, and whilst he was on the scaffold one of the putlogs, which was rotten, gave way, and the plaintiff was thrown to the ground, by which he sustained the injuries complained of. There was no understanding between the defendant and Portlock that he was to have the use of the scaffold, but the defendant was aware of his using it. It did not appear that the defendant knew of the defect in the putlog. On the part of the defendant, evidence was adduced to shew that the accident was caused by the negligence of the plaintiff.

The defendant's counsel submitted that these facts did not sustain the declaration or issues; and that there was no evidence for the jury of the defendant's liability.

The learned Judge left it to the jury to say, first, whether the negligence of the plaintiff contributed to the accident; secondly, whether the negligence of the defendant in erecting the scaffold caused the accident. The jury found the defendant guilty of negligence in the original construction of the scaffold, by reason of the defective putlog, and a verdict was entered for the plaintiff on the first issue, with 50*l.* damages, and for the defendant on the second issue; leave being reserved to the defendant to move to enter the verdict for him: the pleadings to be amended, if necessary.

T. Jones, in the same Term (June 2), obtained a rule

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nisi to enter a nonsuit or a verdict for the defendant, or to arrest the judgment; against which

Montagu Chambers and Tapping shewed cause in last Trinity Vacation (June 22).—The plaintiff, being a stranger to the defendant, and engaged in his lawful business for the benefit of the defendant, is entitled to maintain this action for the injury he has sustained through the defendant's negligence. The case is distinguishable from that of a servant who is injured by the negligence of a fellow servant in the course of their common employment. [*Pollock*, C. B.—Suppose the owner of a mine, which has the usual apparatus for taking people up and down, lets or sells the mine, believing the apparatus to be in sound condition, and the purchaser employs a workman who sustains an injury in consequence of a defect in the apparatus, could the latter maintain an action against the seller of the mine?] Here the scaffold was used with the knowledge of the defendant. The liability does not depend on contract: it is a common law liability arising from the relation of the parties. The case resembles that of the owner of a shop who is bound to keep it reasonably secure, so that persons who lawfully enter it may not sustain any injury through his negligence. In *Southcote v. Stanley (a)*, *Alderson*, B., pointed out that "there is a distinction between persons who come on business and those who come by invitation." And *Bramwell*, B., said, "If a person invites another into his house, and the latter can only enter through a particular door, is it not the duty of the former to take care that the door is in a secure condition?" *Degg v. The Midland Railway Company (b)* was the case of a person who was killed whilst voluntarily assisting the servants of the defendants, and therefore in the same position as a servant. The principles enunciated

(a) 1 H. & N. 247.

(b) 1 H. & N. 773.

in the judgment in *Hutchinson v. The York, Newcastle and Berwick Railway Company* (a) are in favour of the plaintiff. *Knight v. Fox* (b) proceeded on the ground that the injury was occasioned by the negligence of a subcontractor, not of a servant of the defendant, in which case it was conceded that he would have been liable. Here the defendant, by his servants, erected the scaffold. If the only mode of access to the scaffold had been up a ladder which was made of bad materials by the servants of the defendant, he would have been liable for injury occasioned thereby. *Bush v. Steinman* (c) is an authority that a person may be liable in respect of an act done for his benefit upon his premises by persons who are not his servants. [*Pollock*, C. B.—In *Reedie v. The London and North Western Railway Company* (d), *Rolfe*, B., in delivering the judgment of the Court, said that, “according to modern decisions, *Bush v. Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the Court proceeded.”] The allegation in the declaration, that the defendant undertook to erect the scaffold, is immaterial, and may be struck out. Negligence in erecting the scaffold renders the defendant liable for injury to a stranger whilst lawfully working thereon: *Dalyell v. Tyrer* (e).—They also referred to *Roberts v. Smith* (f).

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T. Jones appeared in support of the rule, but was not called upon to argue.

Cur. adv. vult.

The judgment of the Court was now delivered by

WILDE, B.—In this case the declaration charged the defendant with having undertaken to erect a scaffold, and

(a) 5 Exch. 343.

(b) 5 Exch. 721.

(c) 1 Bos. & P. 404.

(d) 4 Exch. 244.

(e) E. B. & E. 899.

(f) 2 H. & N. 213.

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with having so negligently and carelessly done so, that the plaintiff, who was lawfully working upon it, was exposed to unreasonable risk and thrown to the ground and injured by the scaffold giving way.

The defendant pleaded, first, not guilty; secondly, that he did not undertake to erect the scaffold as alleged.

It was proved on the trial that the plaintiff was a labourer: that he was employed by one Portlock to pull down the party wall of a house belonging to the defendant: that Portlock said to him, "there is the scaffold for you to go to work."

The scaffold to which the remark applied was erected under the following circumstances:—

The defendant was a builder and had purchased a house which he was about to pull down; he erected the scaffold in question for his own use, and did use it in pulling down the front and back walls of the house; and on being called upon afterwards to pull down the party wall, he was about to do so when the said Portlock, who was his carpenter, asked for the job, and accordingly the defendant entered into a written contract with him to pull down the party wall for 17*l*. The written contract contained no provision for the use of the scaffold already erected, nor was it in any way understood at the time of making such contract that Portlock was to have the use of the scaffold. But the defendant was aware of its being so used when the wall came to be pulled down; and it may fairly be taken that he allowed Portlock the use of it gratuitously.

One of the putlogs, or cross supports on which the planks of the scaffold rested, turned out to be rotten. There was no evidence whatever that the defendant knew of this defect. The putlog gave way, and was the cause of the accident for which the action was brought. The plaintiff was thrown to the ground and seriously injured.

The jury found the defendant guilty of negligence in the

original construction of the scaffold by reason of the defective putlog, and that the plaintiff's injury was caused by such negligence.

A verdict was entered for the plaintiff for 50*l.*, the defendant having leave to move to enter the verdict for him.

The question that has arisen for this Court is, whether under the foregoing circumstances the defendant is liable in any form of action to the plaintiff for what has occurred; and that the question might be fully raised it was very properly agreed that any necessary amendments in the pleadings might be made. The pleadings therefore become immaterial.

The Court however is of opinion that no such liability exists.

The result of the evidence appears to us to be, that the scaffold in question was lent by the defendant without reward to Portlock, as a ladder or any tool might have been, to assist him in completing the work he had undertaken to perform. And the plaintiff was the servant of Portlock, and nothing more.

So far as the relation of the parties is concerned, it is the case of a gratuitous lender for use, on the one hand, and the servant of the party to whom the article is lent on the other.

In this relation of parties, and in the absence of all proof of knowledge by the lender of the defect which created the mischief, what are the obligations of the lender towards those to whom the article is lent, or by whom it is afterwards used? When the case was argued, it appeared to the Court that the matter was of sufficient general interest and novelty to make it desirable that time should be taken to consider maturely the terms of the judgment they were prepared to give.

Upon consulting the authorities, however, we find that

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the whole matter has been fully considered lately in the Court of Queen's Bench, and an elaborate judgment delivered in which we entirely concur.

This makes it unnecessary to do more than refer to that decision.

In *Blakemore v. The Bristol and Exeter Railway Company* (a), which was an action for injury by an insufficient crane lent by the defendant, the Court laid down the rule of the lender's responsibility thus :—"It may be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower, therefore, is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, *of which he is aware*, and owing to which directly the borrower is injured."

And again :—"The principle laid down in *Coggs v. Bernard*, and followed out by Lord *Kenyon* and *Buller J.*, and by Lord *Tenterden*, in the *Nisi prius* cases cited in the note 1 *Lead. Cas.* 162 (4th ed.), that a gratuitous agent or bailee may be responsible for gross negligence or great want of skill, gets rid of the objection that might be urged from want of consideration to the lender. By the necessarily implied purpose of the loan, a duty is contracted towards the borrower not to conceal from him those defects, *known to the lender*, which may make the loan perilous or unprofitable to him."

It is obvious that, upon the above principle, the defendant would not have been liable even to Portlock, to whom

(a) 8 E. & B. 1035. 1050.

the scaffold was lent, if the accident had happened to him, inasmuch as the defendant was not aware of the defect in question; and, without deciding anything as to the position of the plaintiff, it is plain that he at any rate stands in no better position than Portlock would have done. The verdict must therefore be entered for the defendant.

Judgment for the defendant.

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LYALL and Another v. EDWARDS and MATTHIE.

Jan. 21.

DECLARATION.—That the defendants converted to their own use and wrongfully deprived the plaintiffs of the use and possession of certain of the plaintiffs' goods, that is to say, of twenty-two warrants for twenty-two chests of indigo and twenty-two chests of indigo.

Plea.—That after the alleged causes of action accrued, and before this suit, the plaintiffs, by deed, released the defendants therefrom.

Replication on equitable grounds.—That before and at the time of the execution by the plaintiffs of the said deed

Though a release is general in its terms, the Court will limit its operation to matters contemplated by the parties at the time of its execution.

Trover for indigo warrants.

Plea: that the plaintiffs by deed released the defendants from the causes of action.

Replication,

on equitable grounds, setting out a deed for the liquidation of the affairs of the defendants under inspectorship, and by which the plaintiffs, who were creditors of the defendants, released them "from all and all manner of actions, cause of action and suit, bills, bonds, writings, obligations, debts, &c., claims and demands whatsoever both at law and in equity, or otherwise howsoever." Averments: that at the time the plaintiffs executed the release they did not know that they had any claim against the defendants in respect of the said warrants, and that the plaintiffs executed the deed intending thereby only to release the debt due from the defendants to them. Rejoinder: that the plaintiffs employed the defendants to purchase goods and obtain advances for them, and that there were cross-claims against each other constituting matters of account: that the defendants had authority from the plaintiffs to deposit, as a security for the repayment of advances, the warrants of goods purchased for them, to an amount sufficient to cover the liabilities of the defendants for the plaintiffs: that whilst the said warrants were so deposited, the defendants suspended payment and the parties who held the warrants sold the goods represented thereby: that at the time of the making of the said deed the state of accounts between the plaintiffs and defendants was not ascertained, and whether the defendants had exceeded their authority in depositing the warrants was wholly unknown to the defendants and the plaintiffs: that the release was given in consideration of the execution of the same by other creditors, the consideration for whose execution was the execution by the plaintiffs: that the other creditors supposed that the release was intended to include all claims which the plaintiffs, upon ascertaining the accounts, might have against the defendants. On demurrer to the rejoinder:—*Held*, that the replication was good and the rejoinder bad.

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of release, the defendants were indebted to the plaintiffs in a large sum of money, and, whilst they were so indebted, by an indenture made the 19th day of December, 1857, between the defendants of the first part, D. Chapman and W. Turquand of the second part, and the several persons who were respectively creditors of the defendants on account of their copartnership business (amongst whom were the plaintiffs) of the third part, the several persons who were respectively creditors of the defendant J. Edwards of the fourth part, the several persons who were respectively creditors of the defendant J. Matthie of the fifth part: After reciting that the defendants had carried on business in copartnership as East India and colonial brokers, and that they the defendants having suspended payment on the 18th day of November, 1857, a meeting of their creditors was held on the 26th day of November, 1857, at which a statement of the affairs of the defendants was made, and it was unanimously resolved, amongst other things: 1st. That it was the opinion of the meeting that the interests of the creditors would be consulted by the defendants devoting their services for the realization of the assets under the direction of inspectors. 3rd. That a dividend should be paid as soon as funds could be realized, and that in the meantime a proper deed of inspectorship and liquidation, containing all usual covenants, should be prepared under the approval of the inspectors, and executed by the creditors. 4th. That such deed should contain covenants by the partners to liquidate the affairs of the firm under the inspection, and to divide the proceeds among the creditors rateably, according to the rules of administration adopted in bankruptcy (and covenants by the creditors not to sue the partners for twelve months, and then that the deed should operate as a release of the partners from all claims, or sooner if the inspectors should require it): It was wit-

nessed that, in pursuance of the resolutions and agreement, and in consideration of the covenants thereafter contained on the part of the creditors of the defendants, the defendants did thereby separately covenant and agree with the said parties thereto of the second part in manner in the said deed mentioned, but not material to be here set forth. And it was by the said indenture further witnessed that, in consideration of the covenants of the defendants and of the agreements and provisoes thereinbefore contained, it was thereby agreed and declared, for and on behalf of all the creditors, parties thereto, or bound by those presents; and, further, each of the several creditors executing those presents, did thereby covenant, promise and agree, with and to the defendants and each of them, that upon the expiration of twelve calendar months from the date thereof, unless the inspectors should previously, by writing under their hands, direct that the release of the debtors under those presents should be deferred for any period therein mentioned, and then, at the expiration of such period, unless the inspectors should previously, by writing under their hands, direct that the release of the debtors under those presents should be further deferred for any further period to be therein mentioned, and then, at the expiration of such further period, or immediately after the inspectors should, by writing, certify that the said liquidation had proceeded satisfactorily, then, and upon either of the said cases happening, unless those presents should have previously become void under the provisions thereafter contained, the debtors, and each of them, and their and his heirs, &c., should thenceforth, and without the necessity of any further act or assent, by or on behalf of any of the creditors parties to or bound by those presents, be absolutely released and discharged from all and all manner of actions, cause of action and suit, bills, bonds, writings, obli-

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persons, firms, bodies, persons, and not some of them, in any, independent, special, separate, respective, trust, claims and demands whatsoever, such as any and in equity, or otherwise lawfully, which the said creditors parties do or intend to have presents or any of them, or the heirs, &c. of them, or any of them, then and if thereafter should or might have challenge claim or demand against the debtors, or either of them, or their or his heirs, &c. or their or his estates or effects, for or by reason or on account of all and every or any of the debts or claims in or of them the said creditors parties themselves, or any of them, then done and owing from or enforceable against the debtors, or either of them, or in respect of which any point or claim or dividend might be made or sustained under or by virtue of those presents, or if any other matter, cause or thing whatsoever in respect of the said debts or claims, or any of them; and that, in either of the cases aforesaid, those presents might, without the execution of any further or other release, be pleaded and given in evidence against the said creditors, or any of them, as an actual release, and be so accepted and treated against the said creditors or their representatives.—Averments: that the plaintiffs executed the said deed as parties thereto of the third part, and the said covenant of release in the said indenture contained and hereinafter set forth, is the release in the said plea mentioned: that, at the time of the execution of the said indenture by the plaintiffs, and without any default on the part of them, or either of them, they did not, nor did either of them, know that the defendants had committed the grievances in the declaration mentioned, or that the plaintiffs had any claim or cause of action against the defendants, or either of them, in respect of the goods of the plaintiffs in the declaration mentioned: that the defendants did then know that they had committed the said grievances, and

that the plaintiffs had a claim or cause of action against them in respect of the said goods, but did not inform the plaintiffs thereof before the execution of the said indenture, and the plaintiffs executed the said indenture intending that the execution thereof should, and believing that it did and would, and that it was intended by the defendants to relate only to the sum of money in which the defendants then were indebted to the plaintiffs, and intending thereby only to release the said debt, and not intending to release any other claim or cause of action whatsoever: that if the plaintiffs had known, at the time of the execution of the said indenture, of the existence of the claim in respect of which this action is brought, they would not, nor would either of them, have executed the said indenture.

Demurrer, and joinder therein.

Rejoinder.—The defendants, admitting for the purposes of the rejoinder that they were guilty of the grievances in the declaration complained of, say that they arose in the manner and under the circumstances following, that is to say, that before the making of the said deed and the suspension of payment by the defendants hereinafter mentioned, the plaintiffs and defendants were severally and respectively carrying on business in the city of London, the plaintiffs as merchants, and the defendants as East India and colonial brokers; and the plaintiffs from time to time employed the defendants, as their agents and brokers, to purchase goods for them, and the defendants did from time to time purchase goods for the plaintiffs, including the goods in the declaration mentioned; and the plaintiffs also, from time to time, employed the defendants to obtain for the plaintiffs advances of money, from certain bankers and others, by the discounting of bills of exchange, drawn by the plaintiffs upon and accepted by the defendants; and

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also from time to time to repay such advances for the plaintiffs: that in the course of the said transactions the plaintiffs and defendants had divers cross claims against each other, forming and constituting large matters of account between them, consisting on one side and the other respectively of monies received by the defendants for the plaintiffs' use, and of monies paid by the defendants for the plaintiffs, and also of liabilities which the defendants had come under for the plaintiffs in obtaining advances for the plaintiffs as aforesaid, and also of monies paid by the plaintiffs to the defendants, and also of goods of the plaintiffs purchased for them by the defendants, and remaining in the defendants' hands to be accounted for to the plaintiffs: that the defendants had authority from the plaintiffs to deposit from time to time, upon obtaining such advances for them as aforesaid, as collateral security for the repayment of the same, and to continue deposited as such security, upon the renewal of any such advances upon renewable bills, warrants and other documents representing goods of the plaintiffs purchased for the plaintiffs by the defendants as aforesaid, and from time to time remaining in the hands of the defendants, to such an amount in value as, but no further or greater amount than, would be sufficient to cover the amount for which at the time of making such deposit or continuing the same upon such renewal the defendants were under liabilities for the plaintiffs as aforesaid without having other funds of the plaintiffs in hand, or being indebted to the plaintiffs in a sufficient amount to cover the same, and to deposit the same as security for the repayment only of advances to the last mentioned amount: that whilst certain indigo warrants of the plaintiffs, which had been purchased for them by the defendants as aforesaid, and which had been deposited by the defendants with certain parties as collateral security for the repayment of certain advances obtained for the

plaintiffs as aforesaid, remained in the hands of the said parties, and whilst the said advances still remained unpaid, the defendants became unable to meet their liabilities, and suspended payment, and the said last mentioned advances not being duly repaid, the said parties who had made the same realized the said warrants and sold the said goods of the plaintiffs represented thereby: that at the time of the making of the said deed the true state of the said accounts between the plaintiffs and the defendants had not been finally taken or ascertained, and the extent and amount of the plaintiffs' and defendants' liabilities respectively to one another, at the time of the deposit of the said warrants so sold as aforesaid, was not known to the plaintiffs or the defendants, and whether the defendants had exceeded their authority in depositing or continuing so deposited as security as aforesaid the said warrants so realized as aforesaid, or any part thereof, was wholly unknown to the defendants and the plaintiffs: that the conversion and grievance in the declaration complained of is the deposit and continuing deposited as such security as aforesaid the said warrants, and their subsequent realization, and the sale of the plaintiffs' said goods: that the said deed and release was made and given by the plaintiffs for, amongst others, the divers considerations following to the plaintiffs, which have been duly executed and performed, namely, in consideration of the defendants giving up their property for the benefit of their creditors, and of the defendants devoting their services for the realization of the assets and also of a dividend to be paid, and also the execution of the same by other creditors of the defendants, the consideration for which other creditors executing the same was also, amongst other things, the execution of the same by the plaintiffs: that the said other creditors, at the time of the entering into the said arrangement by the said deed supposed that the

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said release was intended by the plaintiffs, as in fact it was intended by the defendants, to include all claims and rights, if any, that the plaintiffs might be found, upon the taking and ascertaining of the accounts between them, to have had against the defendants at the date of the said suspension of payment in respect of the said transactions and advances, and the forfeiture of any such warrants and securities by such default in payment of the same.

Demurrer, and joinder therein.

J. Dickinson, for the plaintiffs.—First, the replication is good. The question is, whether the defendant is in equity entitled to say that the release extends to claims not in the contemplation of the parties at the time it was executed. The indenture is an ordinary deed for winding up the affairs of a trading copartnership under the direction of inspectors, and if it had contained a schedule, with the amount of the respective debts set opposite the names of the creditors, there could have been no question as to its limit. A Court of equity would not be bound by the general language of the deed, but would admit collateral evidence that the release was not intended to apply to the cause of action mentioned in the declaration. In *Cholmondeley v. Clinton* (a) Sir *W. Grant*, M. R., refers to an unreported case of *Farewell v. Coker* (b), decided by Lord *King*, C., and afterwards affirmed by the House of Lords. There a tenant for life, with remainder to his son in tail, with remainder to himself in fee, devised all his estate to his daughters. The surviving daughter executed a general release to her brother, the tenant in tail, in words sufficient to pass the reversion in fee. She afterwards filed a bill for the purpose of setting aside the release, on the ground that she only meant by it to discharge her brother's estate of a portion to which she was

(a) 2 Meriv. 171.

(b) 2 Meriv. 353.

entitled under some antecedent settlement. On the other hand it was alleged that the release was given for the purpose of conveying her reversion, in order to save her brother the necessity of suffering a common recovery. Lord *King*, C., at first decreed in favour of the daughter, but on a rehearing directed issues to try, first, whether, at the time of the execution of the release, she knew, or was apprised of her title under the will to the reversion. Secondly, whether she intended by the release to pass that reversion. In *Cole v. Gilson* (a) Lord *Hardwicke*, C., said, "It was common in equity to restrain a general release to what was under consideration at the time of giving it." Thirdly, the rejoinder is bad. The question whether the defendants have converted the dock warrants depends on whether, upon a balance of accounts, it appears that the defendants have exceeded their authority in depositing the warrants as a security. But the rejoinder does not allege that any account was stated at the time the release was executed, and therefore the cause of action in the declaration could not be included in it. The facts stated in the replication are not varied by the rejoinder. The replication shews a release of those claims only which were known to the plaintiffs; the rejoinder seeks to include in the release a claim of which the plaintiffs had no knowledge at the time they executed it.

Montague Smith (*Watkin Williams* with him), for the defendants.—There is nothing to shew that it was not the intention of the parties to include this cause of action in the release; and it would be a fraud on the other creditors to exclude it. The recital shews that the object of the deed was to release the defendants, not only from all debts, but from all claims which the plaintiffs had against him, and the other creditors have been induced to execute it upon the faith

(a) 1 Ves. Sen. 503, 506.

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that such claims would be released. The substance of the replication is, that at the time the plaintiffs executed the release they did not know that they had any claim against the defendants in respect of the dock warrants; but this is not a mere question between the plaintiffs and defendants, but one in which third parties are concerned. No doubt, where an instrument is so general in its terms as to release the rights of a party to property to which he was wholly ignorant that he had any title, and which was not within the contemplation of the bargain at the time it was made, a Court of equity will restrain the instrument to the purposes of the bargain, and confine the release to the right intended to be extinguished: Story on Equity Jurisprudence, Sec. 145, p. 171. But the ground of relief is not the mistake or ignorance of material facts alone; but the unconscientious advantage taken of the party by the concealment of them. For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other upon the ground of confidence, or otherwise, there the Court will not interfere:" Sec. 147, p. 173. "And it is essential, in order to set aside such a transaction, not only that an advantage should be taken, but it must arise from some obligation in the party to make the discovery; not from an obligation in point of morals only, but of legal duty:" Sect. 148, p. 173. Here there was no duty on the part of the defendant to communicate to the plaintiff that he had a claim in respect of these dock warrants.

Secondly, the rejoinder is good. It discloses facts which would disentitle the plaintiffs to relief in a Court of equity. [*Martin, B.*—The rejoinder alleges that the defendants were authorized to pledge the warrants under a certain state of circumstances, but it does not state that they pledged them under those circumstances; therefore the rejoinder, upon the face of it, shews a conversion.] The rejoinder

states that the defendants were authorized to pledge the warrants to such an amount as the defendants were under liabilities to the plaintiffs, and that the state of accounts was unknown to either party, or that the defendants had exceeded their authority in depositing the warrants.

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POLLOCK, C. B.—We are all of opinion that the replication is good and there joinder bad. It is a principle long sanctioned in Courts of equity, that a release cannot apply, or be intended to apply to circumstances of which a party had no knowledge at the time he executed it, and that if it is so general in its terms as to include matters never contemplated, the party will be entitled to relief. Here the replication sets out sufficient to shew that the plaintiffs are not bound by the release quoad the circumstances mentioned; and the defendants fail to establish any answer by the rejoinder. There will therefore be judgment for the plaintiffs.

MARTIN, B.—I am also of opinion that the replication is good and the rejoinder bad. The replication is founded on the equitable doctrine that if a release is given for a particular purpose, and it is understood by the parties that its operation is to be limited to that purpose, but it turns out that the terms of the release are more extensive than was intended, a Court of equity will interfere and confine it to that which was in the contemplation of the parties at the time it was executed. The case of *Farewell v. Cocker* (a), which has been referred to, is an authority for that position. Here we are required to call in aid the rule in equity. The substance of the replication is, that the act of conversion committed by the defendants was not within the meaning of the release. The replication is framed so as to shew that

(a) 2 Meriv. 171.

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state of things, and it is for the defendants to answer it. Then how do they do that? The rejoinder begins by stating that the plaintiffs employed the defendants to obtain advances for them and that there were matters of account between them, and that the defendants had authority from the plaintiffs to deposit warrants to an amount sufficient to cover the liabilities they were under for the plaintiffs. The rejoinder then states whilst certain warrants were deposited with certain parties the defendants suspended payment, and the parties realized the warrants: but it does not say that the defendants had any right to deposit the warrants. The rejoinder goes on to say that when the release was executed the accounts between the plaintiffs and defendants were unsettled, and it was unknown whether the balance would be on the one side or the other. What answer does that afford to the replication, or what tendency has it to shew that this cause of action is a matter within the release? If this rejoinder is good, it would be a matter for the jury to find whether in point of fact this cause of action was included in the release. It seems to me that the facts stated in the replication shew that the release was only intended to apply to such claims as ordinary debts, and not to a cause of action for a conversion.

WILDE, B.—I am of the same opinion. The doctrine of a Court of equity is, that a release shall not be construed as applying to something of which the party executing it was ignorant, and we have now to act on that doctrine in a Court of law. I think it will be found that a Court of law would correct a mistake of fact; but it is not necessary to decide that point. However that may be, the replication is good.

With respect to the rejoinder, it is studiously drawn so as to avoid saying that the defendants were authorized to

deposit the warrants. The authority to deposit is set out, and one would expect to find a statement that the warrants were deposited under that authority, but the defendants carefully omit to state anything of the kind. The rejoinder does not answer the allegation in the replication that the plaintiffs were ignorant of the deposit of the warrants. The replication shews that the release was given for the purpose of releasing a debt, and that a claim arising out of a wrongful deposit of the warrants is not within it. For these reasons I think the replication is good and the rejoinder bad.

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Judgment for the plaintiffs.

HOLMES v. CLARKE.

Jan. 12.

DECLARATION.—That after the passing and coming into operation of the act of parliament passed in the year 1844, intituled “An Act to amend the laws relating to labour in factories,” and of “The Factory Act, 1856,” and before and at the time of the committing of the grievances and the sustaining by the plaintiff of the injury hereinafter mentioned, the defendant was the occupier of a building situate in Great Britain, to wit, in the city of Manchester, wherein the defendant carried on the business of a cotton-spinner, and wherein in carrying on, and for the purposes of the said business, a steam-engine producing steam-power was used to move and work machinery employed in preparing and manufacturing cotton, and in the process incident to the manufacture of cotton, the said building being a factory within the meaning of the said statutes; and in part of the said building a certain mill-gearing, being mill-gearing within the meaning of the said statutes, was before

Where machinery is required by statute to be fenced, and a servant enters into the employment of the owner whilst it is protected, and continues in the service after the protection is removed by decay or otherwise, but complains of the danger and is promised, that the protection shall be restored, the master is liable for injury to the servant arising from the want of such protection.

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and at the said time of the said grievances and injury worked and put in motion, and was in motion, by the steam-engine and the power thereof for the purpose of the said manufacture and process; the said part of the said building not being a part or place which, by the 73rd section of the first mentioned Act, or otherwise, is declared to be a part of the factory or place to which the enactment of the said 73rd section, or the definition of the word "factory" is not to extend. And before and at the said time the said building, mill-gearing and steam-engine and power were under the care, management and direction of the defendant; and the said mill-gearing was such as ought, according to the said statutes, to be securely fenced at the said time; and the same was mill-gearing with which children and young persons, within the meaning of the said Act, and women, were liable, within the meaning of the said Act, to come in contact. And the plaintiff before and at the said time was lawfully in the said part of the said factory with the consent of the defendant; Yet the defendant, after the 1st day of June, A.D. 1856, and before this suit, disregarded his duty and the said statutes, and did not securely fence the said mill-gearing, nor was the same securely fenced, contrary to the said statutes, whereby, after the said last mentioned day and before this suit, the clothes of the plaintiff were caught by certain parts of the said mill-gearing so in motion for the purpose aforesaid, and the plaintiff was drawn in and to the same and dragged about, and one of his arms was broken and torn off, and he received other great injuries and was put to very great suffering, and sustained great cost in and about getting medical and other attendance and necessities.

Pleas.—First: Not guilty.

Secondly: that before and at the time of the committing of the alleged grievances and of the sustaining by the plaintiff of the injury in the declaration mentioned, the plaintiff

was a servant of the defendant, employed by the defendant as such to work for the defendant in his said business in the said factory, for reward to the plaintiff in that behalf; and the plaintiff was upwards of twenty-one years of age, and well knew that the said mill-gearing was not securely fenced as aforesaid; and the said clothes of the plaintiff were caught by the said parts of the said mill-gearing, and the plaintiff was drawn in and to the same and dragged about, and he was injured as in the declaration alleged, by and through the plaintiff's own negligence and carelessness and want of due and proper caution in that behalf; and by ordinary care, he could and might and ought to have avoided and prevented the same; and the plaintiff caused and was himself the author of the said injuries so sustained by him.—Issue thereon.

At the trial, before *Wilde*, B., at the Liverpool Summer Assizes, 1860, the following facts appeared:—The plaintiff was a cotton-spinner at Manchester, and the defendant was employed by him in his factory as “under over looker,” at weekly wages. It was the plaintiff's duty to oil the machinery whenever it was required, which was several times a-day. This machinery was worked by steam-power, the motion being communicated to wheels through the medium of shafts. On the 5th of July, 1857, the plaintiff was engaged in oiling a “scutching machine” (for cleaning and tearing the cotton), and in order to reach the spot where the oil was poured into the machinery through small holes, he placed his left arm on the machine near the wheels to support himself, and with his right hand he held the vessel containing the oil, which he poured into the machinery. His left arm was drawn into the machine and torn off. When the plaintiff first entered the service the machine was fenced with an iron guard, but it was broken by accident, and the machine remained unfenced for above a year. The plain-

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tiff had frequently complained to the superintendant of the danger, and he promised that the guard should be mended. On one occasion the defendant had looked at the machine and said that the guard should be mended. In some factories it was the practice to stop the machines whilst they were being oiled, but not in the defendant's, the superintendant having directed the plaintiff, when he was first employed, not to do so. There were two other scutching machines and six other machines (three "breaks" and three "finishing" machines) in the same room, and several women worked in it feeding the scutching machines with cotton. There was a passage between the machines, but none of the workmen had any business to pass the spot where the plaintiff met with the accident, although there was nothing to prevent them, and many were accustomed to do so.

It was submitted, on behalf of the defendant: first, that this machinery was not "mill-gearing" which was required to be fenced by the 7 & 8 Vict. c. 15. Secondly, that the plaintiff had caused the injury by his own negligence. Thirdly, that the defendant was not liable, inasmuch as the plaintiff was the servant of the defendant and did the work voluntarily and of his own accord, and with full knowledge of the danger. The learned Judge reserved the points, the pleadings to be amended, if necessary, and his lordship left it to the jury to say, first, whether the injury was caused by the want of proper caution on the part of the defendant; secondly, whether the plaintiff was guilty of negligence, either in the manner in which he oiled the machinery, or in continuing in the defendant's service after the fencing was removed. The jury found the first question in the affirmative, and the second in the negative; and they gave a verdict for the plaintiff, with 200*l.* damages.

T. Jones, in last Michaelmas Term, obtained a rule nisi to enter a nonsuit, or for a new trial; against which

Bliss and Aspland shewed cause (a).—First, this machinery was “mill-gearing” within the meaning of the Factory Acts, 7 & 8 Vict. c. 15, and the 19 & 20 Vict. c. 38. The 21st section of the 7 & 8 Vict. c. 15 enacts, “That every fly-wheel directly connected with the steam-engine, or water-wheel, or other mechanical power, whether in the engine-house or not, &c., and all parts of the mill-gearing in a factory, shall be securely fenced.” The word “gearing” is not found in Johnson’s Dictionary, but the word “gear” is defined as “apparatus.” In Webster’s Dictionary the word “gearing” is defined as “a train of toothed wheels for transmitting motion in machinery.” Therefore this case is within the 21st section of the 7 & 8 Vict. c. 15, unless it is excluded by the interpretation clause (sect. 73), which declares that “mill-gearing shall be taken to comprehend every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to the manufacturing process.” That clause does not restrict but extends the meaning of the term. The 20th section shews that “mill-gearing” means anything which is in motion for the purpose of propelling any part of the manufacturing machinery. Any other construction would render that section nugatory. The other side would restrain the meaning of the term to that part of the machine by which the motive power is first created; but it comprehends the whole apparatus by which motion is communicated to the machine. There is a distinction between “mill-gearing” the machinery which communicates motion, and the machine which produces manufacture: the latter could not be fenced or it would be inaccessible to the persons at work. Moreover this question is not raised by

(a) In last Michaelmas Term (Nov. 23) and in the present Term (Jan. 11).

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the pleadings, for there is no traverse of the allegation in the declaration that the injury was caused by mill-gearing.

Secondly, this case is entirely different from that class of cases beginning with *Priestley v. Fowler* (a), which decides that a servant cannot recover for injury sustained while in his master's service, for in all those cases the duty of the master depended on contract. Here the duty is imposed by statute, which requires that the master shall fence his machinery, and he is therefore liable for injury sustained by his servant in consequence of a neglect of that duty. *Couch v. Steel* (b) is an authority in point. That was an action by a sailor against a shipowner, and the declaration contained two counts, one on a breach of duty arising from contract, the other on a breach of the duty imposed upon shipowners by the 7 & 8 Vict. c. 112, s. 18, to keep on board the vessel a proper supply of medicines. The first count was held bad; but with respect to the second it was held that, as the plaintiff had sustained an injury from the breach of a statutable duty, the defendant was liable. [*Pollock, C. B.*—There the plaintiff had no means of knowing whether there was a proper supply of medicines on board; here the danger was apparent. If a servant was about to do some work in which his safety depended on the strength of a rope, and he expressed a doubt whether it was sufficiently strong, upon which his master assured him that it was, but it turned out that it was not, and the servant was injured, I can well understand that he would have a right of action. But if a servant for whose protection a statute was passed, knowing that his master has disregarded its provisions, nevertheless chooses to go on with the work, and is injured, can he maintain an action against his master.] Wherever a statutory duty is imposed on the master he is liable for a breach of it.

(a) 3 M. & W. 1.

(b) 3 E. & B. 402.

[*Wilde, B.*—The statute applies to children, and a child of twelve years old can scarcely be considered as contemplating the danger of passing unfenced machinery.] The statute was intended for the protection of all persons working in factories: *Caswell v. Worth* (a). If the servant has used due care the master is not excused merely because the servant knew that some danger existed through the master's neglect, and voluntarily incurred such danger: *Clayards v. Dethick* (b). The cases on this subject were reviewed in *The Bartonshill Coal Company v. Reid* (c), where Lord Cranworth, C., observed that many cases have established this principle, "that where a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against unnecessary risk." *Patterson v. Wallace* (d) is an authority to the same effect. In *Senior v. Ward* (e) the servant had by his own negligence materially contributed to the accident. Here the jury have found that the plaintiff was not guilty of negligence.

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T. Jones, in support of the rule.—First, according to the true construction of the 21st and 73rd section of the 7 & 8 Vict. c. 15, the machinery required to be fenced is that which first communicates the moving power. By the 43rd section, the inspectors may require any other machinery of a dangerous kind to be fenced. The 59th section imposes a penalty for not fencing machinery required by the Act to be fenced. The 60th section imposes a penalty for not fencing machinery required by the inspectors to be fenced. [*Pollock, C. B.*—All but the operative machinery requires fencing. The only question is whether a servant may not be

(a) 5 E. & B. 849.

(b) 12 Q. B. 439.

(c) 3 Macqueen, 266.

(d) 1 Macqueen, 748.

(e) 1 E. & E. 385.

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said to consent to accept the risk when, with knowledge that the statute is broken, he continues to work.] It is clear that, independently of the statute, there is no ground of action. The question then is, whether the circumstance of the defendant being under an obligation to fence the machinery, and liable to a penalty for omitting to do it, gives a right of action to the plaintiff who voluntarily incurs the danger and is paid for incurring it. The statute does not say that the master shall not only be liable to a penalty, but also to an action at the suit of the party injured. [*Pollock*, C. B.—In *Caswell v. Worth* (a) *Coleridge*, J., and *Crompton*, J., were of opinion that the imposition of a penalty did not deprive the party injured of his right to sue for damages.] *Senior v. Ward* (b) is an authority that the master is not liable, if the servant, by his own negligence in knowing and disregarding the danger, has materially contributed to the accident. [*Wilde*, B.—Here the jury found that the plaintiff was not guilty of negligence in continuing in the service.] The plaintiff, being aware that the defendant was guilty of an infraction of the law, was in one sense an abettor of it. [*Pollock*, C. B.—The neglect of the master to fence machinery is not such an offence as to render the servant an accomplice.] If the plaintiff is entitled to recover, every master will be liable who permits a servant to enter upon and pursue an occupation which the servant knows to be hazardous. The plaintiff, who was a weekly servant, should have left the service: having chosen to continue, it was at his own risk: *Skipp v. The Eastern Counties Railway Company* (c), *Assop v. Yates* (d), *Dynen v. Leach* (e), *Priestley v. Fowler* (f). [*Pollock*, C. B.—The doctrine on this subject has arisen since Lord *Abinger* took his seat in this Court:

(a) 5 E. & B. 849.

(b) 1 E. & E. 385.

(c) 9 Exch. 223.

(d) 2 H. & N. 768.

(e) 26 L. J. Exch. 221.

(f) 3 M. & W. 1.

before that time there is no instance of such an action. In subsequent cases the doctrine has been somewhat qualified. If the master is aware of some defect in his machinery, or that a rope or a scaffold is not safe, and he directs his servant to use it, he is responsible. It must not be assumed that in no case can a servant maintain an action against his master in respect of injury caused by a fellow servant. It would be quite consistent with the authorities if we were to hold that a footman might recover against his master for injury arising from the neglect of the coachman or groom, the services being different (*a*). *Wilde, B.*—The whole doctrine is thoroughly elaborated in *Senior v. Ward* (*b*).]—He also referred to *Hutchinson v. The York, Newcastle and Berwick Railway Company* (*c*), and *Wigmore v. Jay* (*d*).

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POLLOCK, C. B., now said :—This was an action for an injury sustained by the plaintiff while in the service of the defendant, who was a cotton spinner, and whose machinery ought to have been protected, but was not, in consequence of which the plaintiff sustained the injury.

The facts of the case are shortly these :—When the plaintiff entered into the defendant's service, the machinery was protected by an iron guard ; but, after he had been some months in the service, the guard was broken either by accident or decay, and the machine remained unprotected. The plaintiff complained of it more than once, and was told that the guard should be restored. This was not done ; and whilst the plaintiff, in the course of his duty, was oiling the machinery, he sustained the injury for which the action was brought.

At the trial, before my brother *Wilde*, a verdict was found

(*a*) See *Abraham v. Reynolds*,
5 H. & N. 143.
(*b*) 1 E. & E. 385.

(*c*) 5 Exch. 343.
(*d*) 5 Exch. 354.

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for the plaintiff, and leave was reserved to the defendant to move to enter a nonsuit on the grounds submitted by his counsel. Two points were made: one a matter of fact, the other of law. First, it was said that the plaintiff had caused the injury by his own negligence; but the jury expressly found that the plaintiff was not guilty of negligence either in the manner in which he oiled the machinery or in remaining in the defendant's service after the protection was removed from it. Therefore the rule on that ground fails. The point of law was, that the plaintiff having undertaken a dangerous service, with knowledge of the danger, could not recover damages in consequence of an injury which ensued from the risk which he had voluntarily undertaken; and the case of *Priestley v. Fowler* (a) was relied on, which was certainly a case of the first impression, and has given rise to what may almost be called a new branch of the law. We are also of opinion that on this point the rule ought to be discharged. Where machinery is required by act of parliament to be protected, so as to guard against danger to persons working it, if a servant enters into the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being decayed or withdrawn, but complains of the want of protection, and the master promises to restore it, but fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant he is responsible. Many cases might be put in which a servant might reasonably incur the risk instead of abandoning the service; and if, during a period when the danger of the service is increased by the machinery becoming unprotected, either by accident or from other cause, the servant complains and the master promises that the protection shall be restored, it

(a) 3 M. & W. 1.

must be considered that the master takes upon himself the responsibility of any accident that may occur during that period.

For these reasons we are of opinion that the plaintiff is entitled to recover in this action, and the rule to enter a nonsuit or grant a new trial must be discharged.

Rule discharged.

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SEYMOUR v. GREENWOOD.

Jan. 20.

DECLARATION.—That the plaintiff was a passenger for reward in and upon a certain carriage of the defendant, used for the conveyance of passengers in a certain public street in the city of Manchester, to wit Chester Road, and being and while he was such passenger, the defendant and his servants so negligently and improperly conducted themselves in and about the driving, managing and conducting of the said carriage, that the plaintiff was thereby cast from the said carriage to the ground with great violence, and his skull was fractured and his legs crushed and bruised, and he suffered great personal injuries, &c.

Pleas.—First: Not guilty. Secondly, that the plaintiff was not a passenger.

At the trial, before *Blackburn J.*, at the last Liverpool Spring Assizes it appeared that the action was brought against the defendant, the proprietor of an omnibus, by the plaintiff, who had been forcibly removed from the omnibus by the guard in charge of it, whereby the plaintiff's skull was fractured. The plaintiff's witnesses

The plaintiff, a passenger by an omnibus, while being forcibly removed from it by the guard in charge, was thrown on the ground and seriously injured. The proprietor of the omnibus, on being applied to for compensation, stated that the plaintiff was drunk and had refused to pay his fare. On cross-examination the plaintiff did not deny that he had been drinking.—*Held*, that if the guard intended to put the plaintiff safely out of the omnibus, there was evidence

that in so doing he was executing the commands of the proprietor his master; and that if the injury was caused by the guard acting without due care in executing such command the proprietor was responsible.

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proved that the plaintiff pulled the wire and the bell rung. The guard then went into the omnibus and seized the plaintiff by the collar. The plaintiff offering no resistance, the guard backed himself out of the omnibus, drawing the plaintiff after him, and threw the plaintiff upon the road. The plaintiff fell to the ground, and a cab, coming up, went over him. The guard did not fall. This was in August, 1859. In December the plaintiff's attorney wrote to the defendant as follows.

"Sir,—I have been requested by Mr. Seymour to write to you in reference to the serious injuries he sustained at the hands of your servants on the 22nd of August last.

"I may state that he was a passenger on that day in your omnibus, &c. He signalled the guard to stop and let him alight. By the negligence and improper conduct of the guard, Mr. Seymour was cast with great violence upon the roadway. One of your Hansom cabs, which was following the omnibus, immediately came into contact with Mr. Seymour's head. I shall be glad to receive any communication from you upon the subject, &c.

"I am, Sir,

"Mr. John Greenwood."

"R. W. Stead."

In consequence of that letter a person named Baxter called on the plaintiff's attorney. He said that Mr. Seymour was mistaken in signalling the guard to stop; that he was drunk, and had refused to pay his fare; that he had created a disturbance in the omnibus lower down the road; that he had first assaulted the guard, and that there had been a scuffle, and that in the scuffle they had both rolled out into the road.

On cross-examination, the plaintiff said his memory was much affected by the accident, but he believed he was not drunk at the time, but he admitted that he had been drinking.

At the conclusion of the plaintiff's case, the defendant's counsel submitted that there was no evidence to charge the defendant with the assault committed by his servant, which was not any negligence in the performance of his duty, but an unwarrantable assault; and a verdict was entered for the plaintiff with leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence on which the jury might reasonably find that the act of the servant was one for which the defendant was answerable.

T. Jones having obtained a rule "to shew cause why the verdict found for the plaintiff on the trial of this cause, &c., should not be set aside, and a nonsuit entered on the ground agreed upon, that there was no evidence to go to the jury,"

Monk and *Wheeler* now shewed cause.—The question is, whether, at the time when the act complained of was committed, the guard was acting as the servant of the defendant. In *Rex v. Gutch* (a), Lord *Tenterden* ruled that the proprietor of a newspaper, who intrusts the conduct of the publication to one whom he selects, is criminally answerable for a libel published in such newspaper, though it is not shewn that he was individually concerned in the particular publication. One of the tests whether the maxim "respondeat superior" applies is, whether the party was enabled to do the wrongful act by reason of his employment. Here there was evidence that the plaintiff was drunk, and it may well have been the duty of the guard to remove him in a careful manner. The removal of the plaintiff from the omnibus was then an act done by the guard with the defendant's authority, and, in the ordinary course of the employment entrusted to him; and it was, therefore, an act for which the defendant is responsible:

(a) M. & M. 433.

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Putten v. Reu (a). The defendant does not suggest that the act of the guard was malicious. [*Pollock*, C. B.—In removing the plaintiff from the omnibus, the guard seems to have acted so carelessly as to injure the plaintiff. *Martin*, B.—The only question is whether there was evidence for the jury.]

T. Jones, in support of the rule.—It may be conceded that the question is whether there was any evidence for the jury. It is submitted that the guard was a trespasser, and that the defendant is not liable for his act. A master is not liable for the trespass of his servant. [*Martin*, B.—If a servant drives his master's carriage against another, the servant is liable in trespass, the master in case.] Was the act one which the relation between the guard and the defendant warranted him in doing? A master is not liable except for acts of omission on the part of the servant—not for acts of commission. Here what is complained of is a trespass—an act committed—not an act of omission, such as negligence in driving or managing the omnibus. By the concurrent testimony of all the witnesses, without provocation the guard dragged the plaintiff out of the omnibus, and threw him on the ground. [*Channell*, B.—Suppose the plaintiff, being a passenger, had grossly misconducted himself, the guard would have been justified in removing him without unnecessary violence. Therefore, if the representation of Baxter is well founded, it may shew that the guard had the authority of the defendant to remove the plaintiff, and, in so doing, was engaged in the business of his master: *Mitchell v. Crassweller* (b).] *M'Manus v. Crichett* (c) shews that a master is not liable in trespass for the wilful act of his servant, as by driving his master's car-

(a) 2 C. B. N. S. 606.

(b) 13 C. B. 237.

(c) 1 East, 106.

riage against another, done without the direction or assent of the master. [*Pollock*, C. B.—Suppose a servant driving along a road in order to avoid supposed danger intentionally drove against the carriage of another, would not the master be responsible?] Not if the servant transgressed the line of his duty. In *M'Manus v. Crichett*, Lord *Kenyon* cites Bro. Ab., tit. "Trespass," pl. 435, where it is said :—"If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished." And 2 Roll. Ab., 553, "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I." In *Savignac v. Roome* (a) it was held that an action on the case, stating that the defendant's servant wilfully drove against the plaintiff's carriage, whereby it was damaged, could not be supported, and the Court arrested the judgment on that ground. In *Roe v. The Birkenhead, Lancashire and Cheshire Junction Railway Company* (b) a railway servant, who had charge of a train, on receiving the plaintiff's ticket, told him he had come by the wrong train, and that he must pay 2s. 6d. more. This the plaintiff refused to pay, and he was thereupon taken into custody by a railway servant, under the direction of the superintendant. The Court held that the plaintiff was bound to shew that the person by whom he was arrested was not only the servant of the Company, but also that he had their authority to arrest him. [*Martin*, B.—That case goes further than any other on this subject. *Channell*, B.—Would it not have been negligence if the guard took the plaintiff out of the omnibus and left him in the middle of a street in a crowded thoroughfare, when he was too drunk to walk?] If a servant is guilty of anything which is not mere want of skill or want of care, the master is not responsible: *Sharrod v. The London and*

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(a) 6 T. R. 125.

Eastern Counties Railway Com-(b) 7 Exch. 36. See also *The* *company v. Broom*, 6 Exch. 314.

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 SEYMOUR *Timothy v. Simpson (c).*
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POLLOCK, C. B.—We are all of opinion that the rule to enter a nonsuit must be discharged. I agree with my brother *Martin* that since the case of *Roe v. The Birkenhead, Lancashire and Cheshire Railway Company* the Courts have been desirous to give full effect to the rule by which a master is made responsible for want of care on the part of his servants in executing his commands. As a Judge, in determining what is evidence, and as a jurymen in giving effect to it, I should have decided that the defendant's servant was ejecting a troublesome passenger from the omnibus—not with violence and brutality, for I do not believe that he intended to do more than put the plaintiff safely out of the omnibus, and that his act in so doing produced the mischief which occurred. I think then that there was evidence that the defendant's servant was executing his master's command, but with a want of care and consideration. I adopt the definition under which *Mr. Jones* admits that his client would be liable. The law on this subject has undergone much discussion of late years. At the time of the decisions of *Scott v. Shepherd (d)* and *M'Manus v. Crickett* the subject had not been so thoroughly considered as it has since been. For these reasons, I think that the rule must be discharged, and my brother *Channell*, who has left the Court, is of the same opinion.

MARTIN, B.—The question is, whether there was evidence from which a jury might find that the act was one for which the defendant was responsible. There was evidence that the plaintiff was drunk, and had refused to pay his fare; he

(a) 4 Exch. 580.
 (c) 6 C. & P. 499.

(b) 9 B. & C. 591.
 (d) 2 W. Black. 892.

had assaulted the guard, and a scuffle took place, in which the plaintiff was thrown to the ground and injured. If the guard used unnecessary violence, the defendant, his master, is responsible. There are many cases, of which *Roe v. The Birkenhead, Lancashire and Cheshire Railway Company* is one, in which the liability of the master is put as resting upon the relation of principal and agent; but in reality it depends upon the relation of master and servant. If the act is one within the scope of the servant's employment, and is done in the master's service, an action lies against the master, and the master is liable, even though he has directed the servant to do nothing wrong. In the present case the act was one which was properly within the scope of the servant's employment. *M'Manus v. Crickett* is ordinarily cited as shewing that the master is not liable for the malicious act of his servant. Of course we do not say that a master is responsible for everything which a servant does in the course of his employment. A great deal has been said as to the act being one which was purely a trespass; but it was nothing more than the guard of an omnibus putting a person out who had misconducted himself. The case of *Roe v. The Birkenhead, Lancashire and Cheshire Railway Company* was much considered in this Court in the cases of *Wilson v. The Lancashire and Yorkshire Railway Company* and *Farren v. The Lancashire and Yorkshire Railway Company* (a).

Rule discharged (b).

(a) Not reported. A short note of these cases may be seen in 27 *Law Times*, 204.

(b) See *Goff v. The Great Northern Railway Company*, Q. B. Hil. Vac., Feb. 13, 1861.

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Jan. 30.

BEHRENS v. THE GREAT NORTHERN RAILWAY COMPANY.

Where a carrier receives goods of the description mentioned in the 11 Geo. 4 & 1 Wm. 4, c. 93, and the person delivering the same has declared their value and nature, he is not bound to tender, but the carrier must demand the increased charge mentioned on the notice affixed in his office, warehouse or receiving house, whether the goods are there delivered, or to a servant sent to fetch them; and if no such demand is made the carrier is liable for the loss of or injury to the goods, although the increased charge has not been paid.

THE first count of the declaration stated that the defendants were common carriers of goods, for hire, from London to Newcastle-on-Tyne, and the plaintiff delivered to the defendants, as such carriers, and the defendants, as such carriers, received, of and from the plaintiff, certain goods of the plaintiff, that is to say, a case containing pictures, to be by the defendants safely and securely carried from London to Newcastle-on-Tyne aforesaid, and to be there delivered for the plaintiff for reward to the defendants. And although all conditions precedent were performed, and all things were done and happened to entitle the plaintiff to have the said goods carried and delivered as aforesaid, yet the defendants so negligently and carelessly carried the said goods that by the means of the negligence, carelessness and improper conduct of the defendants the said pictures were broken, damaged, torn and spoiled &c.—Second count. For that the plaintiff delivered to the defendants, and the defendants received of and from the plaintiff certain goods of the plaintiff, to wit, a case of pictures exceeding in value 10*l.*, and then declared to the defendants to be such case of pictures and to be of the value of 110*l.* and upwards, to be by the defendants carried from Coventry Street, in the county of Middlesex to Newcastle-on-Tyne, and to be there delivered for the plaintiff, for certain reward to the defendants for the said carriage thereof, together with a certain increased rate of charge over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance thereof; an engagement to pay which said increased charge was then accepted by the

plaintiff. And although the plaintiff performed all conditions precedent, and all things were done and happened to entitle the plaintiff to have the said case of pictures carried and delivered as aforesaid: Yet the defendants so negligently carried the same that by means of the negligence, carelessness and improper conduct of the defendants the said pictures were torn, broken and damaged.

Pleas.—First: Not guilty.

Second: to the first count.—That the plaintiff did not deliver to the defendants, nor did they receive the goods in that count mentioned on the terms therein alleged.

Third: to the first count.—That the said pictures were articles and property of the description mentioned in the first section of the statute passed in the first year of the reign of King William the Fourth, for the more effectual protection of common carriers for hire, and were contained in a package which, with the said pictures therein contained, was delivered by the plaintiff to the defendants as and being common carriers by land for hire, for the purpose of being by them as such carriers carried for hire, as in the declaration mentioned, in a public conveyance; and the value of the said goods then exceeded the sum of 10*l*., and at the time of the delivery of the said goods by the plaintiff to the defendants as aforesaid, there was affixed in legible characters, in a public and conspicuous part of the office or receiving house of the defendants, being an office or receiving house where such goods and parcels were then received by the defendants for the purpose of conveyance, a notice within the meaning of the said statute, whereby the defendants notified that an increased rate of charge in the said notice mentioned was required to be paid to them over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of

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articles and property of the description in the first section of the said statute mentioned; and at the time of the delivery of the said parcel and goods to the defendants as aforesaid, for the purpose aforesaid, the value and nature of the said goods were not declared by the person sending or delivering the same, and neither such increased charge as aforesaid, nor any engagement to pay the same, was accepted by the person receiving the said parcel and goods.

Fourth: to the second count.—That the plaintiff did not, when he delivered the said goods to the defendants, declare the same to be a case of pictures of the value of 110*l*. or upwards; nor were the said goods to be carried by the defendants and delivered for the plaintiff for certain reward to the defendants for the carriage thereof, together with a certain increased rate of charge over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance thereof; nor was any engagement to pay any increased charge accepted by the defendants.

The plaintiff joined issue on the several pleas.

At the trial, before *Bramwell*, B., at the Middlesex Sittings after last Michaelmas Term, the following facts appeared.—The defendants were common carriers, by railway, from London to Newcastle, and had an office or receiving-house in the Regent Circus, London, where goods such as those sent by the plaintiff were received for conveyance. There was affixed in legible characters, in a public and conspicuous part of such office, a notice (so far as material) as follows:—

“GREAT NORTHERN RAILWAY.

“In pursuance of an Act of Parliament passed in the first year of the reign of his Majesty King William 4th, cap. 68, intituled &c. (setting out the title):

"For any parcel or package containing paintings, engravings, pictures, glass or china, or any of them, to a greater amount in value than 10*l.*, the increased charge, over and above the common and ordinary charges for carriage is at the rate of 15*l.* for every 100*l.* sterling in value.

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"The Great Northern Company will 'not be liable for the loss of or injury to any parcel or package containing the above mentioned, or any other article or articles or property above the value of 10*l.*, unless the value and nature thereof be declared to them at the time of the delivery thereof, and unless such increased charge as hereinbefore mentioned be paid to them in respect thereof."

The defendants were in the habit not only of receiving goods for carriage at such office, but, if so requested to do by a consignor of goods, of sending a carman and van to the house or shop of the consignor to receive them and cart them to the London station. If a consignor on such an occasion wished to insure goods, the course of the carman in the defendants' employ was to refer such consignor to the defendants' office in Regent Circus.

On the 28th May, 1860, the plaintiff, who was a picture dealer, sent to the office of the defendants a message requesting that they would send to the plaintiff's shop in Coventry Street, Haymarket, a van to receive some goods for carriage. In accordance with this request, the defendants, on the 29th of May, sent to the plaintiff's shop a van in charge of a carman, and the plaintiff then delivered to the carman, for the purpose of being carried to Newcastle, the picture and case in the declaration mentioned; and the plaintiff, at the same time, produced a book containing the following entry, which he then read to the carman:—

"May 29th /60. Received of J. B. Behrens 1 case,

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containing 2 large valuable oil paintings, directed, with great care, to

" Mr. L. STOVER,

" Turk's Head Hotel,

" Grey Street, Newcastle-upon-Tyne.

" Pr. Great Northern Railway, declared over the value of 110*l*."

The plaintiff then asked the carman to sign the entry, and he, after having read it over, did so. The carman then took away the pictures and case. Beyond this nothing passed between the plaintiff and the carman. The picture, on its transit from London to Newcastle, and whilst in the possession of the defendants, was injured.

It was submitted, on behalf of the plaintiff, that he had sufficiently complied with the Carriers Act, and had disproved the third plea, and proved the second count. For the defendants it was contended that the plaintiff had neither paid for, nor engaged to pay the increased charge for insurance, and therefore was not entitled to recover on either count.

The learned Judge left it to the jury to find whether there was any engagement by the plaintiff to pay an increased rate of charge for insurance, and also what amount of damage (if any) the plaintiff was entitled to recover. The jury found that there was no such engagement by the plaintiff, and assessed the damages at 35*l*. The learned Judge then directed a verdict to be entered for the defendants on the second count, and for the plaintiff on the first count, reserving leave to the defendant to move to enter the verdict for them on the third plea; the plaintiff to be at liberty, if a rule should be granted, to rely on the second count as he should think fit.

Hawkins, in the present Term, obtained a rule nisi to enter the verdict for the defendant on the third plea, on the ground that the plea was proved by the evidence, and

that, on the facts proved, the defendants were entitled to the verdict on that plea.

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Edwin James, Keane and F. H. Lewis shewed cause.—
The question depends on the construction of the Carriers Act, 11 Geo. 4 & 1 Wm. 4, c. 68. That statute restricts the common law liability of carriers for the loss of or injury to certain valuable articles, but they are only entitled to protection when a notice of the increased rate of charge has been affixed in their office, and the value of the article has not been declared by the person sending it. If the notice is affixed and the value declared, the carrier has the option of demanding the increased rate in conformity with the notice. The object of the statute was the protection of carriers where the value of certain articles has not been declared. The statute is intituled “An Act for the more effectual protection of mail contractors, stage coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof.” Then the preamble recites the frequent omission by persons sending parcels containing articles of great value to notify the value and nature of their contents, and also the difficulty of fixing parties with knowledge of notices published by carriers. The first section provides that no carrier shall be liable for the loss of or injury to any article of the descriptions enumerated, when the value of such article shall exceed 10*l.*, unless at the time of the delivery thereof at the office, warehouse or receiving house of the carrier, or to his servant, the value and nature of such article shall have been declared by the person sending or delivering the same, and such increased charge as thereafter mentioned, or an engagement to pay the same, be accepted by the

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person receiving such parcel. "Such increased charge" does not mean simply the charge notified, but the charge notified *and demanded*. By the second section, when the value and contents of any parcel have been declared, the carrier may demand and receive an increased rate of charge, to be notified by some notice affixed, in legible characters, in a public and conspicuous part of his office, warehouse or receiving house where the parcels are received. Therefore, to make the increased rate payable, it must first be notified; secondly, demanded. By the third section, when the value shall have been so declared and the increased rate of charge paid, or an engagement to pay the same accepted, the person receiving the increased rate of charge or accepting such agreement shall, if required, sign a receipt for the parcel; and, if such receipt shall not be given when required, or such notice shall not be affixed, the carrier shall be liable as at common law. That shews that there may be a demand of payment, although no notification of an increased rate of charge, and that the legislature contemplated a notification of charge as distinct from a demand of it. Like the ordinary case of turnpike toll, there is no obligation to pay unless the charge is demanded. In *Baxendale v. Hart* (a), Maule J. said:—"The meaning of the statute is, that when the value of the parcel has been declared the carrier may demand an increased rate, in conformity with the notice affixed in his office. The notice is not in restriction of the carrier's liability, but a mere notice of tariff. If there is no tariff, the carrier has no right to charge the increased rate. But if a notice is affixed, and an increased rate demanded, the owner of the goods may refuse to pay it, and require the carrier to carry the goods on the terms of not being responsible for their loss." And Erle, J., added, "The carrier has the option of making an

(a) 6 Exch. 769. 788.

increased charge when the value of the goods has been declared." By the fifth section, every office, warehouse or receiving house, used by the carrier for receiving parcels, shall be deemed his receiving house. The statute having provided that the declaration of value may be made to a servant of the carrier, he is bound to make the demand. Moreover, in this case there has been no notice of an increased rate of charge. The defendants having sent a carman with a cart to receive the plaintiff's goods, the cart was, for the purposes of the Act, the office of the defendants, in which the notice should have been affixed.

The Court then called on

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Hawkins and *C. Pollock* to support the rule.—There is no obligation on a carrier in all cases to demand the increased rate of charge. The first section exempts the carrier from liability unless the value and nature of the article has been declared, *and* the increased charge paid or engaged to be paid. That is one indivisible allegation, and, where there is a failure in the performance of either of these requisites, the carrier is exempt from liability. [*Wilde, B.*—The first section says unless "such increased charge as hereinafter mentioned" is paid; that is, the increased charge which the second section authorizes the carrier to demand.] That section does not vary the interpretation of the first, so as to require it to be read, "such increased charge, which the carrier *shall demand*," but only empowers him to make charges which he could not make at common law. If the legislature had intended that the carrier should be liable, not only in the event of his refusing to give a receipt, but also of his omitting to make a demand, stronger language would have been used. "Such increased" charge has reference to the charge notified. In *Hart v. Bazendale* (a) there was no declaration of the value of the goods,

(a) 6 Exch. 769.

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and the only question was whether the omission of the carrier to affix the required notice in his office rendered him liable. There *Patteson, J.*, after observing that the Act requires the person who sends the goods to take the first step by making the declaration of value, proceeds to say:—
 “Such declaration, when made, will lead to these consequences, that *if the extra charge be paid* and the goods lost the carrier will be liable; or, on the other hand, if he refuse to give a receipt, he will lose the benefit of the statute.”
 The dictum of *Maule, J.*, in that case only explains the order of events, and is no authority that a demand must be made. Besides, the notice in the office is equivalent to a demand. It is not a mere notification of an increased rate of charge, but a distinct notice that the defendants will not be liable unless the value and nature of the articles is declared and the increased charge paid. The object of the notice is to intimate that an increased charge is required to be paid, and the sender of the goods is bound to prove that he has paid it. When the plaintiff made the declaration he must have intended to pay the increased charge, and his conduct was a waiver of any demand. If the goods had been delivered at the office where the notice was affixed, no demand would have been necessary.—They also argued that the statute only requires a notice to be affixed in the office, warehouse or receiving house of the carrier, and that where a cart was sent to fetch the goods, it was not necessary for the carman to carry a notice about with him.

BRAMWELL, B.—We are all of opinion that the rule ought to be discharged. The question is clearly open upon the pleadings, and is whether, when an article delivered to a carrier is declared to be of the value and nature described in the 11 Geo. 4 & 1 Wm. 4, c. 68, it is necessary that the carrier should demand the increased rate of

charge before there is any obligation on the person sending the goods to pay it. The Act is for the more effectual protection of common carriers "against the loss of or injury to parcels or packages delivered to them for conveyance or custody, *the value and contents of which shall not be declared to them by the owners thereof*;" and it recites the frequent practice of bankers and others of sending by public conveyances parcels and packages containing articles of great value in small compass, *without notifying the value and contents thereof*, so as to enable carriers to protect themselves against losses. The object of the first section was to compel persons who sent by carriers valuable parcels to declare their value and contents; and it provides that carriers shall not be liable for the loss of or injury to articles of the description mentioned, where their value shall exceed 10*l.*, unless at the time of their delivery the value and nature shall have been declared by the person sending the same. Now, if the section had stopped there, in my opinion it would have said all that was necessary; but it goes on to say, "and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." That cannot mean in every case, since it is clearly conditional, because if no notice is affixed in the carrier's office there is no obligation to pay the increased charge. It must, therefore, mean that the carrier shall not be liable if the value and nature of the article shall not have been declared, and, *if* an increased charge is to be paid, such increased charge has been demanded and not paid or agreed to be paid. That being so, it seems to me that the object of the first section was to compel a declaration of the value and nature of the article, and to exempt the carrier from liability for its loss or injury unless such declaration was made; and that the latter part of the section is needless, because it is condi-

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tional and must be construed with reference to the second section. That section provides "that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for the carrier to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse or other receiving house where such parcels or packages are received." The first section having insured a declaration of the value and nature of the article, or a non-liability of the carrier, the second section enables him, if he thinks fit, to notify that he will require an increased rate of charge, and thereupon to demand it of the person sending the article. If he does not notify it he cannot demand it; if he does notify it, but does not demand it, he is not entitled to the protection of the Act. I should read the Act, not, as suggested by my brother *Wilde*, as if the two sections were inverted, but by inverting the latter part of the first section and reading it after the former part of the second, thus:—"When any parcel containing any of the articles specified shall be delivered, and its value and contents declared, and such value shall exceed 10*l.*, it shall be lawful for the carrier to demand and receive an increased rate of charge, to be notified by some notice affixed in his office, and unless such increased charge be paid, or an engagement to pay the same be accepted, the carrier shall not be liable."

Then it is said that the plaintiff was bound by the notice affixed in the office. It seems to me that he was bound for all purposes for which it meant to bind him. Suppose, for instance, when he declared the value of the picture, the carter had demanded the increased rate of charge, the plaintiff could not have said "I will not pay so much,"

neither would he have been at liberty to say "I did not know of the notice," for he is as much bound by it as if he had seen it. Other portions of the Act are in conformity with that view. The third section requires a receipt to be given, when the value shall have been declared and the increased rate of charge paid or agreed to be paid, and unless such receipt is given or such notice affixed the carrier is not entitled to the benefit of the Act.

In the result, it seems to me that, according to the true interpretation of the Act, it has two objects in view: one, to compel a declaration of the value and nature of the article delivered; the other, to enable the carrier, by affixing a notice, to demand an extra sum for insurance. When he has given notice that an increased rate of charge is required, he is entitled to demand it, and in that way to get a compensation for the risk he runs in carrying valuable articles. If he does not think fit to put up a notice or demand the increased rate of charge, it must be assumed that he receives the goods on the ordinary terms, and he is liable as a common carrier. Such being my view of the Act, it seems to me that when the value and nature of the article is declared the carrier is bound, though he has affixed the notice, to demand the increased rate of charge. There are obvious reasons why he should do so. For instance, suppose a carrier sends a man to receive a package, as he can know nothing about it the statute says that the sender of the package shall declare its value and nature. On the other hand, there is no reason why a person should know, when a cart is sent to fetch his goods, that there is any particular rate of charge for certain goods. Therefore it seems to me reasonable that the man who comes to fetch the goods should demand the increased rate of charge, not that the sender of the goods should tender a sum which he does not know is the proper charge. If that is the law when a

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person comes to fetch the goods, it is equally the law when the sender takes the goods to the office.

It only remains to notice an argument of Mr. *Pollock*, who said that, assuming a declaration of value to be made, and that it is necessary in every case to make a demand, the conduct of the parties must be looked at to ascertain whether what took place was not equivalent to the sender saying "You need not trouble yourself to make a demand, I will be my own insurer." That is an ingenious argument, but it is not applicable to this case. Besides, the point was not taken at the trial, and if it had been I am disposed to think it would not avail.

On the whole, I think a demand by the carrier is a condition precedent to his right to the increased rate of charge; and the rule must therefore be discharged.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. I agree with my brother *Bramwell* that the question is open on the pleadings. That question is whether, when the sender of articles of the description mentioned in the 11 Geo. 4 & 1 Wm. 4, c. 68, has declared their value and nature, it is necessary for the carrier to demand the increased rate of charge notified by the notice affixed in his office. I am of opinion that it is. In the present case we must assume that the value and nature of the article was declared by the plaintiff, and that no demand of the increased rate of charge was made by the defendants; and then the question arises whether they are entitled to the protection of the statute. It seems to me that the statute must be considered, not as an enactment obliging the sender of valuable articles to take every step necessary to effect an insurance of them, but as merely giving the carrier a right in certain events to impose a statutory restriction on his common law liability. In one

case he is clearly entitled to the protection of the statute, that is where he has affixed a notice in the proper place, and the sender of the goods has not declared their value and nature. So, where the value and nature of the goods has been declared and the increased rate of charge demanded, but the sender of the goods has refused to pay it. But the question now is, when the value and nature of the goods is declared, who is called upon to take the next step? *Baxendale v. Hart (a)* has an important bearing on this subject, though it is not an authority on this point so as to relieve us from construing the statute; yet in putting a construction upon it I cannot adopt any language which will better convey my meaning than a great part of the language there used. Therefore I refer to that case, not as affording a judicial authority which we are bound to follow, but as explaining in clear language the construction we ought to put upon the statute.

It is said that, assuming a demand to be necessary, there has been virtually a demand in this way—that a notice was affixed in the office and that was equivalent to a demand. I do not think the notice can so operate. In order to entitle the carrier to claim the increased rate of charge a notice must be affixed in the office, but when the sender of the goods has declared their value and nature the carrier must make a demand. The notice is not equivalent to a demand, but it restricts the amount to be demanded. I agree with the observations of *Maule, J.*, in the course of the argument in *Baxendale v. Hart (b)*, that when the value of a parcel has been declared the carrier may demand an increased rate of charge, in conformity with the notice affixed in his office. If there is no notice, the carrier has no right to charge the increased rate, but if a notice is affixed, and the increased rate demanded, the carrier is not

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(b) 6 Exch. 769. 782. 788.

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responsible if the sender of the goods refuses to pay it. 'It therefore seems to me that, when the value has been declared, the onus is on the carrier to make the demand, and that the notice is not equivalent to a demand.

At first I was disposed to attach some weight to the view suggested on the argument, that a distinction might be taken between the case of a carman going to fetch goods and the receipt of them at the carrier's office, because a notice must be affixed in the proper place, and the cart which the carrier sent round could not be considered as an office for that purpose. But I am prepared to decide on a broader ground, viz. that if the goods, instead of being delivered to a carman, had been delivered at the receiving house, it would have been incumbent on the carrier to make a demand. For these reasons I think that the rule ought to be discharged.

WILDE, B.—I am also of opinion that the rule ought to be discharged. I can conceive that this may be a question of considerable importance, in consequence of the present practice of railway companies. In order to understand the statute, regard should be had to the state of the law before it passed. At that time a carrier was responsible for every article delivered to him to be carried, whether valuable or not. Moreover, he was bound to carry every article tendered to him, and to carry it at the ordinary rate. That being the state of the law, what did the statute do? Did it cast upon the sender of valuable goods the obligation to insure them? I think not. The common law afforded him that protection, for without any extra payment the carrier was liable for loss of or injury to the goods. Then what did the statute do? It relieved the carrier from responsibility, provided he demanded an increased rate of charge for certain valuable articles and the sender of them refused

to pay it. It gave the carrier, for the first time, the right to demand such an increased rate, and to relieve himself from damages unless the other party paid it. That seems to have been the object of the statute. Reading it in that view, it is obvious that the course which a transaction of this kind would take, and which the statute intended it should take, is this—that the customer should tender to the carrier the article to be carried and declare its value, for he alone could know it; and that the carrier, who acquires a right to an increased rate of charge for valuable articles by reason of being an insurer, should make that charge, and the customer should either pay it, and so be protected against loss, or refuse, and then the carrier, though bound to carry, would not be liable. That seems to me the plain and intelligible course of business between two men, one of whom has a right to send valuable articles to be carried, and the other to make an increased rate of charge on account of their value.

Then is the language of the statute at variance with that view of the subject? I think not. The second section expressly says that it shall be lawful for the carrier to demand and receive an increased rate of charge, “to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles.” There is therefore no doubt that the carrier may make a demand of the increased rate of charge. But then it is said that, by the concluding words of the first section, the carrier is absolutely relieved from all responsibility unless the sender has done certain things, viz. declared the value and nature of the articles and paid or engaged to pay the increased charge. But that section must be read in connection with the second. The words of the first section are “such in-

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creased charge as *hereinafter* mentioned," that is, such increased charge as shall have been demanded under the second section. Reading the two sections in that way, the transaction is effected as it would be in the ordinary business of life, and such appears to me the simple and ordinary construction of the statute. Admitting that a demand was necessary, in this case there has been none, and on that ground the rule ought to be discharged.

It was also said that a notice ought to have been affixed at the place where the parcel was received. But by the first section the parcel may be delivered at the office of the carrier, or to his "bookkeeper, coachman or other servant." It is plain, therefore, that the statute contemplates the sending of parcels, not only delivered at the office, but given to some servant of the carrier. The language of the second section with respect to affixing the notice is not altogether applicable to the first. That seems to me an answer to the argument that the statute intended that a notice should be affixed at every place where the goods were delivered; for that could not be done, having regard to the alterations which modern modes of transit have introduced into the trade of carriers, and seeing that carts are sent round by railway Companies to collect parcels, a practice which did not exist at the time this statute passed. It may be that this is a *casus omissus*, and that if the trade was then carried on as it now is the legislature would have required a notice to be affixed on every cart that was sent to collect parcels. Railway Companies are better judges in matters relating to their business than we are, but it seems to me that it might be good policy, either to affix a notice on the cart, or to direct the carman to refuse to take parcels, when their value was declared, unless the increased rate of charge was paid. That, however, is a

matter which has reference rather to the mode of carrying on business than the law on the subject. For these reasons, and concurring with those expressed by my learned Brothers, I am of opinion that the rule ought to be discharged.

Rule discharged.

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THE declaration stated that the defendant broke and entered the house and offices of the plaintiff, situate and being in the High Street, Wellington, in the county of Somerset, and abutting &c.; and unlawfully broke and forced open the doors thereof and damaged and injured the same; and opened and broke open and ransacked the drawers and cupboards thereof, and the books and papers therein, and carried away the same.

Plea.—Not guilty (by statute 15 & 16 Vict. c. 54, s. 6; 9 & 10 Vict. c. 95, ss. 23, 41, 42, 55, 138, 24, 27, 78; 12 & 13 Vict. c. 101, s. 12; 19 & 20 Vict. c. 108, s. 32: all public Acts).

At the trial, before *Keating, J.*, at the last Somersetshire Assizes, the following facts appeared.—The plaintiff was a solicitor residing at Wellington in Somersetshire, and was also registrar of the Wellington County Court. The defendant was treasurer of that Court. The plaintiff before his appointment as registrar carried on his business as

A registrar of a County Court rented offices in which he carried on his business as a solicitor and also the County Court business, he being allowed by the Treasury an annual sum for the part of the offices used for County Court purposes. The treasurer of the County Court, gave the registrar notice of his intention to audit the accounts on a Saturday, when, by a County Court Rule, the office closed at one o'clock. The treasurer went to the office after one o'clock, and finding it

closed, broke the locks of an inner door and a cupboard in which the books were kept, and having taken away the books and audited them, returned them to the office. The registrar having brought an action of trespass against him:—*Held*, that he was justified in so doing under the County Court Acts.

The defendant pleaded "not guilty by statute," and in the margin of the plea referred to several statutes. In addition, he relied at the trial on a section of one of the statutes not referred to, but no objection was taken.—*Held*, that the objection, that this section was not mentioned in the margin of the plea, was not available on the argument of a rule to enter a nonsuit in pursuance of leave reserved.

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solicitor at his dwelling house, but after his appointment he took offices in the High Street of Wellington for a term of ten years at a rent of 22*l.* a year, he paying all the rates and taxes. In this office he carried on both the County Court business and his private practice. He applied to the defendant, as treasurer, for some allowance in respect of the use of the offices for the County Court business, and the defendant allowed him 10*l.* a year. The plaintiff, being dissatisfied with this allowance, on the 8th May, 1857, presented to the Lords of the Treasury a memorial, which (after stating the above facts) concluded with the following prayer:—"That your lordships will be pleased to make an order on the said treasurer, either to find offices that are fit and convenient for the use of the registrar of the said Court and his clerks for the proper conduct and management of the business of the said Court, and also to defray the expense of cleaning, warming and lighting the same; or to allow to your memorialist such sums as he pays for the same, or such other sums as to your lordships shall seem reasonable and just."

On the 29th May, 1857, the plaintiff received the following reply to his memorial.

"Sir, " Treasury Chambers, 29th May, 1857.

"I am commanded by the Lords Commissioners of her Majesty's Treasury to inform you, in reply to your letter of the 8th inst., that they are prepared to allow to you the sum of 16*l.* per annum for the use of that part of the premises alluded to in your letter as having been hired by you in the High Street of Wellington, and which is required and used for County Court purposes; such allowance to commence from the 1st January, 1857, and to include the expenses of cleansing, lighting and warming that part of the premises so used. I am further commanded by their lordships to state to you, that were it necessary for

the Treasury to hire separate premises for the office business of the Wellington Court, sufficient accommodation for such business only would be engaged; in which case the private business of the registrar could not be permitted to be carried on therein.

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"I remain, Sir, your obedient Servant,

"W. Burrige, Esq.

"James Wilson."

"Registrar of County Court,

"Wellington, Somerset."

The plaintiff accordingly received the sum of 16*l.*, and he gave quarterly receipts for 4*l.* "for rent" of the County Court office. The books of the County Court were kept at the plaintiff's office, and the office was closed on Saturday at one o'clock in the afternoon, in pursuance of a rule framed under the provisions of the 19 & 20 Vict. c. 108, s. 32. On the 3rd April the plaintiff received a letter from the defendant stating that he "proposed to audit the Wellington books, for the quarter ended the 31st December, 1859, on Saturday next the 7th instant." The plaintiff wrote, in answer, that he had an engagement at Taunton on that day at twelve o'clock on public business, and that, as he should be absent from eleven till half past three or four, he would be glad if the defendant would attend on the Monday or Wednesday in the following week. The defendant wrote, in reply, that he had arranged to examine the accounts on Saturday, and that the plaintiff's attendance would not be necessary. On the Saturday the plaintiff went to Taunton, having left instructions with his clerk to allow the defendant to inspect the County Court books, if he called, but directing that the office should be closed at one o'clock. The clerk accordingly closed the office at one o'clock. At three o'clock the defendant arrived at Wellington, and sent his clerk to the registrar's office to bring the books to the inn to be audited as usual. The

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office being locked, and the clerk being unable to obtain access to the books, the defendant went to the office with a locksmith, who, by the defendant's directions, forced the lock of the inner door and the cupboard in which the books were kept, and removed them to the inn, where he audited them, and then returned them to the office and caused the door of it to be again fastened.

It was submitted, on the part of the defendant, that he was justified in what he had done, under the 18th section of the County Court Rules, and the 48th section of the 9 & 10 Vict. c. 95, and the other provisions of the County Court Acts referred to in the margin of the plea. Under the direction of the learned Judge the jury found a verdict for the plaintiff, and assessed the damages at 5*l.*, leave being reserved to the defendant to move to enter the verdict for him, the decision of the Court above to be final.

Sir *F. Slade*, in the following Term, obtained a rule nisi to enter a nonsuit or a verdict for the defendant, on the ground that he was justified by law, under the County Court Acts and the Rules of those Courts, in what he did.

Kinglake, Serjt., *Dowdeswell* and *Coleridge* shewed cause in the present Term (Jan. 14).—The question is, whether the plaintiff had such a possession of the premises as to entitle him to maintain trespass. The defendant contends that the premises were hired by and vested in him, as treasurer, under the 9 & 10 Vict. c. 95, s. 48. That section enacts "That the treasurer of any Court holden under this Act for which a court-house and offices &c. shall not have been already provided, or where such court-house and offices are inconvenient or insufficient, shall, as soon as conveniently may be, &c., build, purchase, hire or otherwise provide messuages and lands, with all necessary ap-

purtenances, fit for holding the Court therein, and for the offices necessary for carrying on the business of the said Court; or instead of providing separate buildings may contract with any person, being the owner of or having the control and management of any county or town hall or other buildings, for the use and occupation thereof, or of so much thereof as may be needed for the purposes of this Act, and subject to such annual rent &c. as may be agreed upon, &c.; and all lands, messuages and other real and personal estates and effects belonging to the Court shall vest in the treasurer for the time being, and in his successors in that office, in trust for the purposes of this Act." That section only applies to cases where there has been a demise of premises to the treasurer for the sole purpose of the County Court business. The arrangement between the Lords of the Treasury and the plaintiff created no estate in the defendant, as treasurer. The plaintiff was lessee and occupier of the offices, and responsible for the rent and taxes; and he permitted the County Court business to be carried on upon his premises. That was a mere license or easement, which, not being under seal, was revocable at any time: *Wood v. Leadbitter* (a). The case of *Regina v. Smith* (b) is an authority in point. There the defendant rented a house, of which five of the principal rooms were occupied by the surveyor of taxes and the collector of Inland Revenue, under an agreement to let them for an annual sum, to include all expenses, viz. rent, rates, taxes, gas, wood, coals, and a servant to reside on the premises. Another room was occupied by the defendant as an office for vending stamps by him as distributor for the district. The question was, whether the defendant was liable to be rated as beneficial occupier of the whole house; and the Court, in giving judgment, said: "With reference

(a) 13 M. & W. 838.

(b) 30 L. J., Mag. Cas. 74.

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to the agreement, we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant, retaining possession of these rooms and keeping his servant there, bound himself to supply the other party there with fire and gas and attendance. It is true the exclusive enjoyment of the rooms is to be given; but that is the case where a guest at an inn, or a lodger in a house, has a separate apartment, or where a passenger in a ship has a separate cabin, in which case it is clear that the possession remains in the innkeeper, lodging-house keeper or shipowner." [Channell, B.—The 48th section of the 9 & 10 Vict. c. 95 enables the treasurer to contract for the use and occupation of a building, "or of so much thereof as may be needed for the purposes of the Act," and subject to an annual rent: then by the latter part of the section the premises vest in the treasurer.] That provision is qualified by the words "belonging to the Court:" the Court had no estate in the plaintiff's premises, but the mere use of a room. The question then is, whether the defendant had any right of entry because the books of the County Court were on the plaintiff's premises. It is conceded that if a person takes and places on his own premises the goods of another, the latter may enter and retake them: *Patrick v. Colerick* (a); but that does not apply here, because the books were in the lawful custody of the plaintiff. [Martin, B.—In *Patrick v. Colerick*, Parke, B., pointed out that "the passage there cited from Blackstone (b), as to the right of recaption, applies to the case where the goods are placed on the ground of a third party," and that "all the old authorities say, that where a party places the goods on his own close, he gives to the owner of them an implied license to enter for the purpose of recaption."] It would be no answer to an indictment for forcible

(a) 3 M. & W. 483.

(b) Vol. 3, p. 4.

entry that the defendant had a right of entry and came to take possession of his own property: the forcible assertion of such right constitutes the offence. [*Pollock*, C. B.—The passage cited from Blackstone is under the head “Redress of private wrongs by act of parties,” and it is there said: “If my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law.”]—Then with respect to the County Court Rules framed in pursuance of the 19 & 20 Vict. c. 108, s. 32. By Rule 6, “the registrar shall keep an office at each place where the Court of which he is registrar is holden, and such office shall be kept open every day from ten o’clock in the morning until four o’clock in the afternoon, except on Christmas Day &c., and except also on Saturdays, on which day the office may be closed at one o’clock in the afternoon.” By Rule 18, “all the books of the Court, including the bankers’ book and cash book, shall at all times be open to the inspection of the treasurer.” That must mean at all times when the office is required by the 6th Rule to be kept open. Here the defendant went to the office at a time when he knew it was closed. Suppose a person deposited his title deeds with his solicitor, would he have a right to go to the solicitor’s office after it was closed and break open an iron safe for the purpose of getting the deeds? Moreover, assuming that the 48th section of the 9 & 10 Vict. c. 95 is applicable to this case, the defendant cannot avail himself of it, because he has not inserted it in the margin of his plea, as required by the Reg. Gen., Trin. T. 1853, r. 21.

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Sir *F. Slade* (with whom was *Stock*), in support of the

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rule.—The defendant was justified in obtaining access to the books for the purpose of auditing them. The plaintiff's conduct led the defendant to suppose that he acquiesced in the propriety of an audit on the day appointed. The defendant's right, as regards the plaintiff, to take possession of the books is the same as it would be against a third person from whom a room was hired for the County Court business. Such third person could not object to an audit at any particular time because it did not suit his convenience, and the fact of the plaintiff being registrar of the Court makes no difference. Suppose there was some ground for suspecting dishonesty on the part of the registrar, it would be most important that the accounts should be privately examined.—He was then stopped by the Court.

POLLOCK, C. B.—This is an action by the registrar against the treasurer of a County Court, and it appears that the treasurer had made an appointment to audit the County Court books on a certain day, and that he went for that purpose to the plaintiff's premises at a time which certainly cannot be considered an improper period of the day. We are all of opinion that what the treasurer did was right, there being no breach of the peace. There is nothing in what has been urged before us at all interfering with the treasurer's perfect right to discharge a public duty. This case goes beyond the question of a right to a personal chattel, to which the owner wishes to get access: it is the case of a superior officer desiring to have access to books which it was the duty of an inferior officer to produce for his inspection. Under these circumstances, I am of opinion that the defendant was perfectly justified in doing what he did, and the rule must be absolute to enter a nonsuit.

MARTIN, B.—I am of the same opinion. I regret that we are called upon to give judgment in an action between persons holding offices of this description ; they have, however, insisted on the judgment of the Court (a), and are entitled to have it. I am of opinion, upon the evidence, that there was nothing which vested the possession of the room in the defendant. For that purpose something more should have been done—rent should have been paid in respect of a demise of the particular room ; and if the case had rested there I should have been of opinion that the plaintiff was entitled to retain the verdict. But I think that the defendant had a right to get possession of the books. It is clear, from the way in which the case was reserved, that we are at liberty to take into consideration the 48th section of the 9 & 10 Vict. c. 95. If the objection had been taken at the trial that the section was not mentioned in the margin of the plea, the learned Judge might have amended under the 222nd section of the Common Law Procedure Act, 1852. But the defendant's counsel referred to that section at the conclusion of the plaintiff's case, and no objection having been then made none can be made now. The 48th section of the 9 & 10 Vict. c. 95 says that all "personal estates and effects belonging to the Court shall vest in the treasurer for the time being." Therefore no one can doubt that these books, being the books of the Court, were the personal estate and effects of the treasurer. It was the duty of the treasurer to inspect the books, and he gave the plaintiff notice of his intention to do so. It is true that he came to the plaintiff's office after one o'clock on a Saturday, but the rule as to closing on that day applies to the public and not to the officers of the Court. The notice having been

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(a) In the course of the argument the parties should come to some arrangement.

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given, it was the duty of the plaintiff to be at the office, or depute some person, to enable the defendant to inspect the books. The defendant went to the office at the appointed time, and found it closed. He did not break the outer door, but he picked the lock of an inner door, and there is no doubt that was a breaking and entering; indeed I am not aware of any distinction between the inner door of a house and a wall or fence of a close. The defendant then took away his chattels, and the case of *Patrick v. Colerick* (a) is an authority to shew that it was a lawful act. I regret that we are called upon to give any judgment, but, being of the opinion which I have expressed, I think the rule ought to be absolute to enter a nonsuit.

CHANNELL, B.—I also regret that we are called upon to decide this matter, but as we are required to do so, I think that the rule to enter a nonsuit should be absolute. I agree with my brother *Martin* that there was no demise of the room; and if the question had arisen between the plaintiff and defendant as individuals, and not under the 48th section of the 9 & 10 Vict. c. 95, we could not have made the rule absolute. Then, are we at liberty to refer to that section? I am of opinion that we are. At the close of the plaintiff's case the defendant's counsel asked for a nonsuit, and the application was founded on the 48th section. If any objection had been taken, no doubt it was competent to the learned Judge to amend by inserting a reference to that section in the margin of the plea. The learned Judge reserved the matter for the consideration of the Court, and again, when the case was concluded and a verdict found for the plaintiff with 5*l.* damages, he reserved leave to the defendant to move to enter a nonsuit, binding the parties to rest satisfied with the decision of this Court.

(a) 3 M. & W. 483.

Under these circumstances I think that we are at liberty to consider the 48th section, the same as if a reference to that section had been inserted in the margin of the plea. Then how does the case stand with regard to that section? I do not say that, apart from it, the fact of the defendant's goods being in the plaintiff's house would give the defendant any right to go there; whether that is so or not it is unnecessary to determine; but taking into consideration that the 48th section vests the property in the books in the defendant, and also the fact that there was some contract, to which the plaintiff was a party, for the use and occupation of the room, and having also regard to the facts proved at the trial, I think the defendant has shewn a leave and license justifying the step he took.

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WILDE, B.—I entirely concur in the judgments delivered by my learned Brothers; and I cannot help adding that I am sorry that an action of this kind should be brought, because the plaintiff has sustained no injury whatever. It appears that the plaintiff left instructions with his clerk to allow the defendant to inspect the books; the clerk left the office at one o'clock, and when the defendant came he could not get in. He had a lock picked, and having taken the books and inspected them he returned them to the office, which he locked up again. In so doing he only did what he was entitled to do, and no outrage took place. In my opinion there was no reasonable ground for bringing the action, and that the rule ought to be absolute.

Rule absolute to enter a nonsuit.

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Jan. 12. THE COMPANY OF PROPRIETORS OF THE GRAND UNION
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The 87th section of the 50 (Geo. 3, c. cxxii., which incorporated certain persons for the purpose of making a canal, enacts that the lord of every manor through which the canal, collateral cut, and reservoirs shall be made, "shall have and be entitled to the right of fishery of and in so much of the said canal, cut and reservoirs as shall be made in, over, or through the common or waste lands within his manor, and over or other lands through any or grounds, in the waters whereof such lord now hath the right of fishery; and that the owner of any other lands through which the said canal and collateral cut shall be made, shall also have and be entitled to the like right of fishery of and in so much of the said canal or collateral cut as shall be made in, over, or through his lands."

Held:—First, that "commons or waste lands" meant commonable lands, the ownership of the soil of which was in the lord of the manor, and not open fields over which certain persons had rights in severalty.

Secondly:—That the right of the lord, as owner of the land through which the canal was made, was limited to fishing in the canal and collateral cut, excluding the reservoir.

THIS was an action of trespass for breaking and entering a close of the plaintiffs, called "Naseby," in the county of Nottingham. By consent of the parties and order of the Court the following case was stated for the opinion of this Court:—

The plaintiffs are owners of the Grand Union Canal and the Naseby Reservoir, by an act of parliament made in the 50 Geo. 3 (a), intituled "An Act for making and maintaining a navigable canal from the Union Canal in the parish of Gumley in the county of Leicester, to join the Grand Junction Canal near Long Buckby in the county of Northampton, and for making a collateral cut from the said intended canal." By the Act the plaintiffs were empowered to purchase land for making the canal and reservoir and using the same for that purpose. It contains the following clauses relative to the purchase of common or waste land.

Section 21. "And be it further enacted, That in all cases where there shall be occasion to cut through, take, or use part of any common or waste ground for the purposes of this Act, the conveyance thereof by the lord or lady of the manor wherein the same shall be situate shall be a good and sufficient conveyance to the said Company of Proprietors, for the purpose of vesting in them the fee simple and

(a) c. cxxii.

inheritance thereof, as fully and effectually as if every person having right of common upon such common or waste ground had joined in and executed such conveyance; and that the compensation to be paid for any right of common upon any such commons or waste ground as aforesaid shall be paid by the said Company of Proprietors to the churchwardens of the respective parishes wherein such commons or waste grounds shall lie, and shall be by such churchwardens received and applied for such general or public purposes within such parishes respectively as a vestry of every such parish, to be convened by such churchwardens for that purpose, shall direct; anything in this Act to the contrary thereof notwithstanding."

The Act also contains the following clause relative to the rights of fishery and shooting.—Section 87: "Provided always and be it further enacted, That the lord and lords, lady and ladies of all and every the manor and manors through which the said canal, collateral cut, and reservoirs thereto belonging, or any of them, shall be made shall have and be entitled to the right of fishery of and in so much of the said canal, cut, and reservoirs as shall be made in, over, or through the common or waste lands within his, her, or their manors respectively, and over or through any other lands or grounds in the waters whereof such lord or lords, lady or ladies now hath or have, or is or are entitled to the right of fishery; and that the owner or owners of any other lands or grounds through which the said canal or collateral cut shall be made, shall also have and be entitled to the like right of fishery of and in so much of the said canal or collateral cut as shall be made in, over, or through his, her, or their lands or grounds respectively wherein he, she, or they had the right of fishery before the passing of this Act, so as that in the use or exercise of the said right of fishery the said canal and collateral cut and other works hereby authorized to be made shall not be damaged, prejudiced,

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or obstructed, or any water drawn or taken from or out of the same, and so as the said Company of Proprietors, or their agents, servants, or workmen, or any of them, shall not be liable to any penalty, action, or prosecution, for or by reason of the taking or destroying of any fish in the said canal, collateral cut, or reservoirs, or any of them, which shall be taken, killed or destroyed through or by means of the letting off the water out of them respectively, on account of any repairs or works to be done in and about the same, or for any other purposes of the navigation of the said canal and cut, or either of them. And also that it shall be lawful to and for the said lord or lords of such manor or manors, or his or their gamekeeper or gamekeepers, and the owner or owners of such lands and grounds through which the said cut or canal shall be made (being qualified by law so to do) to take and kill game or wild fowl upon so much of the said cut or canal, reservoir or reservoirs, trenches, towing-paths, and other the lands and grounds to be set out for the use of the said navigation, as shall be made through their respective lands or grounds as aforesaid, in like manner as if the land or ground so to be set out as aforesaid had remained undisposed of by virtue of this Act."

Shortly after the passing of the plaintiffs' act of parliament the plaintiffs proceeded to purchase land for making their canal and reservoirs, and amongst other land the plaintiffs purchased land for the Naseby Reservoir in the Naseby Field. This land the plaintiffs purchased of a Lady Pocock and Mr. and Mrs. Maddick, who respectively conveyed it to the Company by deeds: that of Lady Pocock dated 30th December, 1812, and that of Mr. and Mrs. Maddick dated the 16th January, 1813 (a).

(a) It was agreed that these deeds, as also the Company's act of parliament, should form part of the special case. The deeds did not convey the land as common or waste land but as ordinary open fields.

The Naseby Field is in the parish and manor of Naseby, and at the time of the above purchases and conveyances it was all open and unenclosed, and the said Lady Pocock was lady of the manor of Naseby. After her, Mr. Fitzgerald became lord of the manor of Naseby, and to him succeeded Lord Clifden, who at the time of the committing the alleged trespasses by the defendant in Naseby was and still is lord of the manor of Naseby. The land purchased of Mr. and Mrs. Maddick was land of which the said Mrs. Maddick was, at the time of the purchase and conveyance, tenant for life under the will of the defendant's ancestor, George Ashby; and the land so purchased adjoined and still adjoins other land of which she was also tenant for life under the same will, and the last mentioned land on the death of the said Mrs. Maddick descended upon the defendant, who became of age in 1855, as tenant in tail in remainder under and by virtue of the same will.

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The plaintiffs on completion took possession of the land so conveyed to them, and upon such land and upon lands purchased by them in Cold Ashby they proceeded to make the Naseby Reservoir, which was being formed when the Naseby Inclosure Act hereinafter mentioned was made, but was not completed till shortly afterwards. The reservoir contains about 160 acres. A brook which runs through the land divides the parishes of Naseby and Cold Ashby, and a brook called the Naseby Brook falls into the former brook.

The Company having formed the reservoir used it for the purposes of their canal, and did the requisite repairs to it, and remained in possession, subject to the lease hereinafter mentioned, from that time up to and until the commencement of this action.

In the year 1820, the Naseby Inclosure Act (1 Geo. 4)

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was passed, and it is agreed that it shall form part of the case (a).

The Commissioners made their award in 1823.

On the 3rd of September, 1822, the plaintiffs by lease under seal demised to Mr. Purcell, the brother-in-law of Mr. Fitzgerald, the then lord of the manor, and who then occupied the house and grounds now occupied by the defendant under Lord Clifden, the present lord of the manor, the right of fishery and fishing and fowling over the public reservoir and the herbage of so much of the land within the fences of the reservoir as was not then, or should not be thereafter during the lease, covered with water, and

(a) Cap. 24. A Private Act.—The case set out the preamble and 27th section of the Act as follows:—"Whereas the manor and parish of Naseby in the county of Northampton are extensive, and contain by estimation 3500 acres of land or thereabouts, part of which consists of old enclosures or old enclosed lands, and the residue and greater part of which consists of open and common fields, wastes and other commonable lands. And whereas Frances Fitzgerald, the wife of John Fitzgerald, Esq., or the said John Fitzgerald in her right, is seised during her life of the said manor of Naseby, and of several old enclosures and common field lands within the same. And whereas John Maddick, Esq., in right of his wife Hannah Maria Maddick, is impropiator of the impropriate rectory of Naseby aforesaid, and as such entitled to certain glebe lands and right of common appurtenant thereto and

to all tithes, moduses, compositions and other payments in lieu of tithes arising from and payable within the said parish, and is also patron of the vicarage of Naseby aforesaid, and likewise proprietor of certain open fields and ancient enclosures with the said parish."

Sect. 27. "And be it further enacted, that inasmuch as the Company of Proprietors of the Grand Union Canal are possessed of certain pieces of land, late parts of certain open or common fields within the said parish of Naseby, which have been purchased for a reservoir and feeder and road therefrom for the purposes of the said canal, it shall and may be lawful to and for the said Commissioners, and they are hereby authorized and required, to allot to the said Company of Proprietors the said pieces of land as the same have been enclosed or set out and ascertained by virtue of the act of parliament passed for making the said canal."

which was computed to amount to forty-six acres; and also a piece of land in Cold Ashby containing an acre and thirty-two perches: To hold to the said C. Purcell for fourteen years at a certain rent therein particularly mentioned.

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On the 21st January, 1854, the plaintiffs granted another lease for fourteen years to John Kightley of the right of fishery and fishing and fowling in the reservoir and the herbage of the land within the reservoir fences, which was not then and should not be during the said term covered with water, and the same piece of land with the cottage erected thereon in the said indenture mentioned, at a certain rent therein mentioned, which said last mentioned lease is still subsisting.

At the trial the plaintiffs proved that in September, 1858, the water of the reservoir being then low and covered with ice, the defendant, accompanied by his keeper, came about 150 yards across the soil of the reservoir, in the parish of Naseby, and then broke the ice, and killed and shot, and took the fish out of the reservoir and carried them away.

(The case then set out the evidence given at the trial, from which the inference was that the Naseby Field was not common or waste land, the soil of which was in the lord of the manor, but open fields over which the occupiers of certain lands had rights in severalty, and which were grazed by them according to their stint.)

The question for the opinion of the Court is, whether upon the facts and evidence above stated the plaintiffs or defendant are entitled to the verdict. The Court to be at liberty to draw any inferences from the facts.

Hayes, Serjt. (with whom was *Field*), argued for the plaintiff in last Michaelmas Term (November 19).—The question depends on the construction of the 50 Geo. 3, c. cxxii., which reserves to lords of manors certain rights. The 87th section provides that the lords of manors, through

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which the canal, collateral cut and reservoirs thereto belonging shall be made, shall have the right of fishery in so much of the canal, cut and reservoirs as shall be made in, over or through "the common or waste lands" within his manor, and over or through any other lands or grounds, in the waters whereof such lords now have the right of fishery. The 21st section, which provides for the conveyance of land by lords of manors to the Company, also uses the words "common or waste land," thereby shewing that the legislature contemplated land the soil of which belonged to the lord, and over which other persons had rights in common for their cattle, levant and couchant. The locus in quo is not land of that description, but open fields over which certain persons have rights in severalty in respect of the ownership of certain land, and over which each person grazed according to his stint. The deeds by which it was conveyed to the Company do not describe it as common or waste land, but as open fields. The 23rd section of the 1 Geo. 4, c. 24, provides for an allotment to the lord or lady of the manor as compensation for their right and interest "in and to the soil of all the waste and unknown lands lying in the said common and open fields and other commonable lands and grounds hereby directed to be divided and enclosed." [*Bramwell*, B.—By the 87th section of the 50 Geo. 3, c. cxxii., the lord of the manor is entitled to a right of fishery in the canal, cut and reservoir made in common or waste land within his manor, and any other lands or grounds in the waters whereof he is entitled to the right of fishery. This land is not "common or waste land" within the meaning of the first branch of the section; and the right as owner, under the second branch, is limited to fishing in the canal or collateral cut.] The expression "common or waste land" means land belonging to the lord of the manor, and over which other persons have incorporeal rights. The word "reservoir" has been purposely

omitted in the second branch of the section.—He also argued that the plaintiffs were not precluded, by their demises of the 3rd of September, 1826, and 21st January, 1854, from maintaining this action, since there was no demise of the soil or water, but only of the right of fishery. On this point he cited *Holford v. Bailey (a)*.

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Mellor (Beasley with him), for the defendant.—This is “common or waste land” within the meaning of the 87th section of the 50 Geo. 3, c. cxxii. The fact that it is enjoyed by some of the tenants in severalty is not inconsistent with its being commonable land. In *Gibson v. Smith (b)* Lord *Hardwicke*, C., said:—“In several manors there are some part of the tenants only which have a right of commoning, and yet it does not follow but it may be waste, and belong to the lord as much as if it was a general common. . . . The being stinted does not at all prove that they are not waste, but only for the benefit of the tenants, and are not, for this reason, less the waste of the lord than before.” The preamble of the 1 Geo. 4, c. 24, recites that part of the manor of Naseby consists of old inclosures, “and the residue of open and common fields, wastes, and other commonable lands.” By the 27th section the Commissioners are required to allot to the Company certain pieces of land “late parts of certain open or common fields” which they purchased for a reservoir. [*Bramwell*, B.—If the 87th section of the 50 Geo. 3, c. cxxii. had said “provided the lord of the manor is entitled to the common or waste lands,” it could not have been contended that the statute meant to give him the right of fishery over common or waste lands of which he was not the owner.] The legislature never intended that the Company should have the right of fishing. The 50 Geo. 3, c. cxxii., enables

(a) 13 Q. B. 426.

(b) 2 Atk. 182.

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them to purchase lands "for the use of the navigation;" and *Bostock v. The North Staffordshire Railway Company* (a) is an express authority that a Company incorporated for a specific purpose has no power to use its lands for any other purpose. [Channell, B.—May not a railway Company sell the grass which grows on an embankment of their line, or let the ground under their arches?] They could not convert their land to a purpose not authorized by the legislature. It was ultra vires for the Company to demise a several fishery in a reservoir made for a canal.—He also argued that the Company could not maintain trespass. On this point he cited *Cox v. Glue* (b).

Hayes replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

BRAMWELL, B.—We are of opinion the plaintiff is entitled to judgment. The defendant committed an act of trespass, for which he is liable unless he can shew a justification. His first answer is that he is entitled under the lord of the manor. We are of opinion the lord of the manor had no title such as the defendant sets up. The title is asserted under the 50 Geo. 3, c. cxxii., s. 87, by which lords of manors, through which the canal, cut and reservoirs shall be made, shall have and be entitled to the right of fishery of and in so much of the canal, cut and reservoirs as shall be made in, over or through the common or waste lands within their manors, and over or through any other lands or grounds in the waters whereof such lords have the right of fishery. This obviously means to give them the right where the ownership of the soil was in them, where there was then no water, fish or fishery, and to continue it in the lords where there

(a) 4 E. & B. 798.

(b) 5 C. B. 533.

were already water and fish, and the fishery was in the lord. It is impossible to suppose that if (as in the present case) the soil of part of the land taken was not in the lord, he should have the right of fishery, and not the owner of the soil. It is a mistake to construe this Act as though it was a general Act relating to all England, and so to all manors and waters. It relates to certain definite places. We are not told that, in fact, there was any waste to be taken which was not owned by the lord of the manor in which it was. What might be the decision if such a case existed it is not necessary to say. But the remark is made to shew that it is not to be assumed that lords of manors were to have rights of fishery where they were not owners of the soil. The words "common or waste" land then are satisfied by giving them their natural meaning; and there is not only no reason to extend them to such land as that in question, but the contrary; and this meaning is shewn to be correct by other sections of the statute. This ground of defence fails therefore. (See sections 21, 97.)

But then the defendant makes a second claim under the latter part of the section, as owner of the land through or adjoining which the reservoir is made. But the rights of such owners are limited to fishing in the "canal and collateral" cut, omitting "reservoirs." This omission is obviously not accidental, for the word "reservoir" is sometimes inserted and sometimes omitted on many occasions, and correctly, on the supposition that lords of manors may fish in some reservoirs, but that adjoining owners, as such, may not. And indeed there may be a reason for not giving an adjoining owner a right of fishery over a larger extent of ground than has been taken from him. However, speculation on this is useless, as we think the words plain. The plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

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ADAMS v. THE GREAT WESTERN RAILWAY COMPANY.

The Great Western Railway Company has its principal station at Paddington, where the directors meet, the secretary resides, general meetings are held, and whence orders emanate.—*Held*, that the Company “dwells” at Paddington within the meaning of that word in the 9 & 10 Vict. c. 95, s. 128; and consequently that, where a plaintiff in an action against the Company dwelt more than twenty miles from Paddington, the superior Court had concurrent jurisdiction.

THIS was an action against the defendants, as carriers, to recover compensation for the non-delivery of two boxes, containing merchandize and a few articles of clothing.

At the trial before *Blackburn, J.*, at the Surrey Summer Assizes, 1859, a verdict was found for the plaintiff, with 3*l.* damages. The learned Judge declined to certify for costs.

On application subsequently made at Chambers, *Martin, B.*, ordered that the plaintiff should recover his costs.

From the affidavits on which the order was made, it appeared that the action was brought by the plaintiff, who at the time of its commencement dwelt and carried on his business at Redditch in the county of Worcester, to recover compensation for the non-delivery of goods contained in two boxes. The boxes, which contained a large quantity of merchandize and a few articles of clothing, were lost while being taken by the plaintiff as his personal luggage as a passenger on the defendants’ line from Oswestry to Chester. The contract between the plaintiff and the defendants was made at Oswestry. The principal office of the defendants’ railway, where the secretary resides, the directors meet, and at which general meetings are held, is at Paddington, in the county of Middlesex. Paddington, Oswestry, Chester, and the part of the line where the boxes must have been lost, are each more than twenty miles from Redditch. Redditch is, however, within twenty miles of the Birmingham station of the defendants’ railway at which the defendants carry on business as a Railway Company and as common carriers. Birmingham is one of the principal

stations of the Company, and a plaint might and could have been served there. The cause of action did not arise without the jurisdiction of the Birmingham County Court. On being applied to for compensation, the superintendant wrote to say that any writ that the plaintiff's attorney "would send to the secretary of the Company at the Paddington terminus would meet with due attention."

Digby, in Michaelmas Term, had obtained a rule nisi to rescind the order of *Martin, B.*; against which

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Pigott, Serjt., and *Joseph Sharpe* now shewed cause.—The plaintiff "dwells more than twenty miles from the defendants;" therefore the case is one in which concurrent jurisdiction is given to the superior Courts by the 9 & 10 Vict. c. 95, s. 128, and the order was properly made by the learned Judge under the 15 & 16 Vict. c. 54, s. 4. The Company cannot be said to dwell at all their stations throughout the country. The principal office is at Paddington, where the secretary resides, where legal notices may be served, and where the central government of the Company is carried on: *Garton v. The Great Western Railway Company* (a). It is there that the Company "dwells." [*Martin, B.*, referred to *Taylor v. The Crowland Gas Company* (b), and *Corbett v. The General Steam Navigation Company* (c).] Merely carrying on business at a particular station is not dwelling there. In *Kerr v. Haynes* (d) it was held that a person, who carried on business as a law stationer in London, and occupied three houses there, passing three or four days of each week in London, occupying rooms in one of the houses, but always absenting himself when business permitted it, and residing with his family at Margate, where his wife, family and servants were

(a) E. B. & E. 837.

(b) 11 Exch. 1.

(c) 4 H. & N. 482.

(d) 29 L. J., Q. B. 70.

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permanently established, dwelt at Margate, and not in London, his residence in town being entirely subservient to the purposes of his business, and to that alone. If a corporation cannot "dwell" anywhere it can have no domicile; but a corporation can have a domicile. *The Dutch West India Company v. Moses* (a), and *The National Bank of St. Charles v. De Bernales* (b), shew that foreign corporations can sue here, and that the validity of their incorporation must be tested by the law of the place of their domicile. In the case of corporations the question where they dwell depends on their domicile. Assuming that the defendants dwell in two places, one within twenty miles of the plaintiff's residence, and the other beyond that distance, the superior Courts have concurrent jurisdiction under the 9 & 10 Vict. c. 95, s. 128. *Butler v. Ablewhite* (c) is a decision to that effect by the Court of Common Pleas. In *Macdougall v. Paterson* (d) that Court had previously expressed a similar opinion. Upon the same principle it has been held that where one of several defendants resides out of the jurisdiction of the County Court within which the cause of action arose, the superior Courts have concurrent jurisdiction: *Doyle v. Lawrence* (e). The defendants dwell and carry on business, within the meaning of the 128th section of the 9 & 10 Vict. c. 95, at Paddington only, and not elsewhere. [Wilde, B.—The words appear to point to some one place at which the party dwells and carries on his business. In one sense a great carrier may be said to carry on his business all over the kingdom.]—(They also argued, that the learned Judge must be taken to have decided, under the 15 & 16 Vict. c. 94, s. 4, that the action was properly brought in the superior Court.)

(a) 1 Stra. 613.

(b) 1 Car. & P. 569.

(c) 6 C. B., N. S. 740.

(d) 11 C. B. 755.

(e) 2 L. M. & P. 368.

Hawkins and *Digby*, in support of the rule.—First, the plaintiff resides at Redditch, which is within twenty miles of a place where the defendants have a station and carry on business. A railway Company must be deemed to dwell where it carries on its business: *Taylor v. The Crowland Gas and Coke Company* (a). It cannot be said that the defendants do not carry on their business at each of their stations. It is not necessary that they should carry on business exclusively at a particular station. That appears by analogy to the case of *Kerr v. Haynes* (b). [Wilde, B.—The argument on the other side is that the Company must be deemed to reside at Paddington, either exclusively, or at least at Paddington as well as elsewhere; and that in either case the superior Courts have concurrent jurisdiction. *Kerr v. Haynes* (b) is a strong authority against the defendants on the latter point.] The word *dwells*, in the 128th section of the 9 & 10 Vict. c. 95, refers to dwelling in the ordinary and popular sense. A man does not dwell at a particular place by merely taking his meals and occasionally sleeping there: *Kerr v. Haynes* (b), *Dunston v. Paterson* (c); nor by carrying on business at such place by an agent: *Sheils v. Rait* (d). The defendants, a corporation, by carrying on business at Paddington, cannot be said to dwell there. The station is not their dwelling-house, in which a burglary could be committed: *Rex v. Martin* (e).—(They also referred to *Bailey v. Bryant* (f).)

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POLLOCK, C. B.—This was an application to set aside an order of my brother *Martin* that the plaintiff should recover his costs in an action against the Great Western Railway Company, on the ground that he dwelt more than

(a) 11 Exch. 1.

(b) 29 L. J., Q. B. 70.

(c) 5 C. B., N. S. 267.

(d) 7 C. B. 116.

(e) Russ. & Ry. 108.

(f) 1 E. & E. 340.

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twenty miles from the defendants, and therefore had a right to sue in the superior Court. It appears to me that the order was correct, and the rule must be discharged. For a considerable time, no doubt, this Court thought that they had a discretion in these cases, but the other Courts having come to a different conclusion we thought it right that uniformity of practice should prevail, and have since held that a plaintiff is entitled to his costs as a matter of right where there is concurrent jurisdiction. The decisions have established that this Company dwells at Paddington, and that being so the superior Courts have concurrent jurisdiction, and the plaintiff had a right to bring his action in this Court. Therefore the rule must be discharged.

MARTIN, B.—I am of the same opinion. In the case of *Taylor v. The Crowland Gas Company* (a), upon the construction of the 9 & 10 Vict. c. 95, s. 128, this Court decided that a corporation can “dwell” at the place where its business is carried on. In my judgment the word “dwell” in this section, when applied to a corporation, means something analogous to what it means when applied to an individual, viz., a dwelling at some fixed known place, not on the whole line of the railway, but where its principal business is carried on. The letter written by the defendants shews that the head office was the place where the officer competent to decide with respect to the question between the plaintiff and the defendants was to be found.

CHANNELL, B.—I agree that the rule must be discharged. Assuming that the fact of a concurrent jurisdiction was established to the satisfaction of my brother *Martin*, he had no discretion on the subject, but was bound to make the order. I come to the conclusion that such jurisdiction

(a) 11 Exch. 1.

existed by reference to the first branch of the 128th section of the 9 & 10 Vict. c. 95, and it is quite unnecessary to advert to other parts of it. If *Taylor v. The Crowland Gas Company* (a) is not a direct authority for the plaintiff, it goes a long way towards deciding the question now raised; and, adopting the reason given for the judgment in that case, I am of opinion that the defendants dwell at Paddington, and nowhere else.

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WILDE, B.—I am of the same opinion. The question is whether the superior Court had concurrent jurisdiction, and that depends upon whether the plaintiff dwells more than twenty miles from the defendants. The language of the 128th section of the 9 & 10 Vict. c. 95 is somewhat defective when applied to corporations. But it would be a misfortune if we were obliged to hold that it did not apply to corporations; and in fact in *Taylor v. The Crowland Gas Company* (a) this Court decided that point. There the question was, where must a corporation be said to dwell? And it was held that it dwelt at the principal place where its business was carried on. I agree that we must assimilate the case to that of an individual. The “home” of a Company must be taken to be that place which is occupied as such,—where their profits come home to them, whence orders emanate, and where the chief officers of the Company are to be found. The Great Western Railway appears to dwell at Paddington and at Paddington alone.

Rule discharged.

(a) 11 Exch. 1.



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Jan. 11.

THE WELLAND RAILWAY COMPANY *v.* BLAKE.

To a declaration for calls by a railway Company incorporated by the Canadian legislature, setting out specifically and at length the Acts empowering the Company to sue, and the several facts shewing the liability of the defendant as a shareholder, the plea of "never indebted" may be pleaded; and the Court has no power to set aside such plea, on the ground that it tends to embarrass the plaintiff by putting him to unnecessary, needless and expensive proof.

DECLARATION.—That on the 23rd of May, 1853, a certain law, being an Act of the Canadian legislature, entitled "An Act to incorporate the Port Dalhousie and Thorold Railway Company," was enacted in the province of Canada by the Queen's most excellent Majesty, with the consent and advice of the legislative council and of the legislative assembly of the province of Canada, constituted and assembled by virtue of and under the authority of an act of parliament passed in the parliament of the United Kingdom of Great Britain and Ireland, entitled "An Act to reunite the provinces of Upper and Lower Canada, and for the government of Canada." (The declaration then set out parts of the colonial Act, which incorporated the Company by the name of the Port Dalhousie and Thorold Railway Company, embodied in itself parts of the Canadian Railway Clauses Consolidation Act, empowered the Company to complete the railway, and enacted that the capital should be 75,000*l.* currency, to be divided into 3000 shares of 25*l.* each. The declaration also set out certain provisions as to general meetings, the appointment, qualification and powers of directors: also a provision that no call should exceed 10*l.* per cent. on the amount of the shares, &c.) That on the 16th of May, 1856, another Act of the Canadian legislation was enacted, &c. (The declaration set out parts of this Act which, after reciting that the Port Dalhousie and Thorold Railway Company had prayed for power to extend their railway to Port Colborne, empowered the Company to construct the line and to increase their capital to 100,000*l.* currency, to be divided into shares of 25*l.*, &c.) That in

May, 1857, another Act of the Canadian legislature was enacted. (The declaration set out parts of this Act, which empowered the Company to increase their capital by 75,000*l.* currency, changed the name of the Company to the Welland Railway Company, and enabled them to appoint an agent, and keep transfer books in London.) That the Railway Clauses Consolidation Act so incorporated was an Act of the Canadian legislature. (The declaration set out the preamble and several sections of this Canadian Act, viz. section 7 : the interpretation clause. Section 8 : as to the effect of the incorporation of a Company. Section 15 : as to the power to hold general meetings. Section 16, which contains several clauses as to the powers of boards of directors, &c., and calls, the 13th clause being as follows:—"In any action or suit to recover any money due upon any call, it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is the holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear shall amount, in respect of one call or more upon one share or more, stating the number and amount of such calls, whereby an action hath accrued to the said Company by virtue of the special Act.") That the plaintiffs are the Welland Railway Company, and are identical with the Port Dalhousie Company ; that the said Acts are laws in and for the province of Canada ; that the board of directors duly appointed, consisting of directors duly qualified according to the said Acts, on the 17th of June, 1857, in the province of Canada, made a call on the defendant, amongst other shareholders, in respect of the amount of capital owned by the said shareholders, being 10*l.* per cent. on the amount of their shares, and gave notice, &c. (The declaration then stated the making of four other calls, the last being in November, 1859.) That, after the passing of the said Acts, another Act

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of the Canadian legislature, entitled "An Act to amend the Acts relating to the Welland Railway Company," was passed. (The declaration set out parts of this Act which made further provision for the appointment of directors, and the regulation and management of the Company, and proceeded to state the making of another call, under that Act, on the 11th of January, 1860.) That before and at the time of the making of these calls, the defendant was a shareholder, that is to say, a holder of stock to the amount of fifty shares of 20*L*. 1*s*. each, being the calls in respect of which the shares were made; that all times had elapsed and all things happened necessary to make the defendant liable to pay the calls and entitle the plaintiffs to sue the defendant for the same, and to render the defendant liable to pay interest at 6*L*. per cent., but that the calls, amounting to 573*L*. &c., were unpaid.

The defendant pleaded "Never indebted."

Bovill, in this Term, had obtained a rule calling on the defendant to shew cause why this plea should not be struck out, or why he should not amend or alter the plea by confining it to a denial of some single allegation of a matter of fact, or in such other way as the Court should direct.

The rule was obtained on an affidavit stating, (*inter alia*) that the plea would cause great and unnecessary embarrassment and delay, as the evidence to prove the numerous matters which it put in issue would have to be procured in Canada; that the allegations were true, and that the defendant had no ground to suppose them untrue, and that the reason why they were all traversed was to delay the cause and embarrass the plaintiffs, and not because the allegations were supposed by the defendant to be untrue.

Montague Smith and *C. G. Merewether* shewed cause (*a*).—

(*a*) In Michaelmas Term, Nov. 23. Before *Bramwell*, B., *Chancellor*, B. *Wilde*, B., left the Court during the course of the argument.

This is a count in debt on simple contract, to which the plea of "never indebted" may properly be pleaded. By the Pleading Rules of Hilary Term, 4 Wm. 4, as to pleading in covenant and debt, rule 3, it was provided, that in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead "that he never was indebted in manner and form as in the declaration alleged," &c. [*Channell*, B.—Is this "debt on simple contract?"] It is not debt on a specialty, or on a statute having force in this country. Therefore, before the Common Law Procedure Act, 1852, the plea would have been allowed. By the 76th section of that Act it is enacted, that "a defendant may traverse generally such of the facts contained in the declaration as might have been denied by one plea." It is not inconsistent with the practice of the Court in other cases to allow such a plea. The widest inquiries arise upon the common counts. [*Wilde*, B.—The form, which is given in the Common Law Procedure Act, 1852, Sched. B., No. 36, is said to be "applicable to declarations like those numbered 1 to 14, which are indebitatus counts. The Pleading Rule of Trinity Term, 1853, No. 6, provides that "to causes of action to which the plea of 'never was indebted,' is applicable as provided in Sched. B. (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of *non assumpsit* shall be inadmissible; and the plea of never indebted will operate as a denial of these matters of fact from which the liability of the defendant arises." The object of the rule was to enable the defendant to deny generally and in a compendious form the existence of the facts alleged as constituting his liability. The 79th section of the Act places the plaintiff in a similar position as to the defendant's pleadings. By rules 8 and 12, all matters in confession and avoidance are to be pleaded specially.

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Boill, in support of the rule.—The action is not debt on simple contract but on a legal liability arising out of the Acts of the Canadian legislature. By the Pleading Rules of Hilary Term, 4 Wm. 4, as to pleading in covenant and debt, the plea of nil debet is abolished; and after providing that, in actions of debt on simple contract, the defendant may plead “never indebted”, it is provided, by rule 4, that “*in other actions of debt* in which the plea of nil debet has hitherto been allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.” The present case falls within the 4th rule, and, therefore, at the time of the passing of the Common Law Procedure Act, 1852, the defendant must have traversed the allegations in the declaration separately. The Pleading Rule of Trin. T. 1853, No. 6, applies merely to the indebitatus counts numbered 1 to 14 in Schedule B. to the Common Law Procedure Act, 1852, or to other counts of a similar character. [*Bramwell*, B.—The Pleading Rule of Trin. T. 1853, No. 7, which provides that, in actions upon bills of exchange and promissory notes, the plea of “non assumpsit” and of “never indebted” shall be inadmissible, omits the words “other actions” which are found in Rule No. 4 of the Pleading Rules of Hil. T. 1853.]

Cur. adv. vult.

The judgment of the Court was now delivered by

CHANNELL, B.—This was an application to set aside a plea as embarrassing. The action is by a Canadian Railway Company, incorporated and empowered by the Canadian legislature, to recover calls on shares. The declaration sets forth the plaintiffs’ case with particularity, and to it is pleaded the plea in question, “never indebted.” No doubt

the plea is embarrassing in one sense, viz., it puts the plaintiffs to a large amount of difficult, expensive and needless proof. But if it is a lawful plea we have no power to set it aside,—the power to set aside embarrassing pleas being limited to such as are at once embarrassing and irregular, informal or tricky, and contrary to the rules and practice of pleading.

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We think the plea is a lawful plea, and that the defendant has a right to plead it. By the Pleading Rules of Hilary Term, 1834, “nil debet” was abolished, and in actions of debt on simple contract, other than on bills and notes, “never indebted” might be pleaded. In other actions of debt other pleas were provided. Whether the Pleading Rules of Hilary Term, 1853, were meant as a substitute for those of 1834 is not certain. They say “nil debet” shall not be pleaded in any action. But they do not say what shall be, except in certain actions which do not include such an action as the present. It seems therefore the former rules in this respect subsist. Then, is this a debt on simple contract? We think it is. There appears to be no other definition of such a debt than that it is one which the defendant has contracted not under seal. This is such a case in our Courts. Whether an action for calls by a Company incorporated under the Companies Clauses Consolidation Act 1845, would be a debt on simple contract is another question. (See *The Edinburgh, Leith and Newhaven Railway Company v. Hebblewhite*, 6 M. & W. 707). In this case we think the plea is a lawful plea, and the rule must be discharged; and the defendant’s costs of the rule must be his costs of the cause in any event.

Rule accordingly.

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Jan. 16.

THE WELLAND RAILWAY COMPANY v. BERRIE.

An Act incorporating a railway Company provided that no call of money from the shareholders should exceed ten per cent. on the amount of their shares: also, that the directors might, from time to time make such calls as they should deem necessary: Provided that thirty days' notice be given of such call, and that no call exceed the prescribed amount, nor made at a less interval than two months from the previous call, or a greater amount be called in, in any one year, than the prescribed amount. In an action for a call, the defendant pleaded that the directors

made more calls and to a greater amount than were prescribed by the Act, and that the said call was made in excess of the calls by the Act empowered to be made. Replication: That the calls in the plea mentioned, other than the call sued for, were not authorized by the Act, and were therefore void; and that the call sued for was not a call made in excess of the calls by the Act empowered to be made, if the void calls are not reckoned as calls by the Act empowered to be made: and that the defendant did not pay the void calls, or any part thereof.—*Held*, on demurrer, that the replication was bad, since it did not shew that the directors had declared the calls void; and, consistently with it, they might have received the greater part of the money called for.

THE declaration set out an Act of the Canadian legislature, passed the 23rd May, 1853, and intituled "An Act to incorporate the Port Dalhousie and Thorold Railway Company." By the 9th section of this Act, it was enacted "That no call of money from the shareholders shall exceed ten per cent. on the amount of their shares." The declaration then set out another Act of the Canadian legislature, passed the 16th May, 1856, intituled "An Act to extend the line of the Port Dalhousie and Thorold Railway Company." The declaration then set out another Act of the Canadian legislature, intituled "An Act to increase the capital stock of the Port Dalhousie and Thorold Railway Company, and to change the name of the Company." By the 5th section of this Act, it was enacted that "The style and name of the Port Dalhousie and Thorold Extension Railway Company shall from and after the passing of this Act be The Welland Railway Company." By section 16 it was thus enacted:—"The directors may from time to time make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall deem necessary: Provided that thirty days' notice at the least be given of such call, and that no call exceed the prescribed amount to be determined therefor in the special Act, nor made at a less interval than two

months from the previous call, or a greater amount to be called in, in any one year, than the prescribed amount therefor in the special Act; and every shareholder shall be liable to pay the amount of the call so made in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the Company or the directors."—Averments: "That the Board of directors of the said Company, duly appointed and constituted according to the said Acts and consisting of directors duly qualified according to the same Acts, on the 2nd November, 1859, in the Province of Canada, under and according to the said Acts, deeming the call hereinafter mentioned necessary, made a call of money on, amongst other shareholders, the defendant, who then was a shareholder in the said Company, in respect of the amount of capital owned by the said shareholders respectively, including the defendant, being a call of ten per cent. on the amount of their respective shares, and gave thirty days' notice of the said call to the defendant and the said other shareholders respectively, according to the said Acts: that no other call was made within two such months, as in the said Acts mentioned, next before the making of the said call, and that no greater amount was called in, in the year in which the said call was made, than the amount prescribed therefor in the said Acts; and the said directors duly, according to the said Acts, appointed persons, times and places, to and at which respectively the said call was to be paid."—The declaration then proceeded to aver that at the time of making the call, the defendant was a shareholder; that the time for payment of the call had elapsed; that all things were done and happened necessary to make the defendant liable to pay the call, and to entitle the plaintiffs to sue him for it. Breach: Non-payment.

Plea (inter alia).—That the said directors made more

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calls for money, and to a greater amount, than were prescribed by the said Acts, and that the said call was a call made in excess of the calls by the said Acts empowered to be made, and not otherwise.

Replication.—That the calls in the said plea mentioned respectively, other than the call sued for, were not authorized by the said Canadian Acts or any of them, or otherwise, and were therefore void; and that the call sued for in this action was not a call in excess of the calls by the said Acts empowered to be made, if the said void calls are not reckoned as calls by the said Acts empowered to be made; and the plaintiffs say that the defendant did not pay the said void calls respectively, or any part thereof, nor were the same or any part thereof paid on the shares, or any of them, in respect of which the defendant is sued in this action.

Demurrer and joinder therein.

Lush (C. W. Wood with him), in support of the demurrer.—The replication is bad. The plea alleges that the call sued for was in excess of the calls by the Canadian Acts allowed to be made. The replication alleges that the previous calls were not authorized by those Acts, and if they are not reckoned as calls, this call is not in excess, and that the defendant has not paid the previous calls. [*Wilde*, B.—It does not say that the other shareholders have not paid them.] The Company cannot treat the previous calls as void, since, for aught that appears, they may have enforced them against the other shareholders. [*Pollock*, C. B.—The Company cannot object to their calls when the shareholders do not.] It does not appear that the Company abandoned the previous calls. The defendant may have purchased his shares after the previous calls, upon the faith that they had been made and without any knowledge that they were invalid. [*Channell*, B.—It is consistent with the declaration

that the defendant may have purchased his shares between the time of the previous calls and the call now sued for.]

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Bovill, contra.—No presumption of payment arises from the fact that calls were made: if the other shareholders have paid the previous calls, or the Company have done any act to validate them, that should have been stated by way of rejoinder. The circumstance that the Company have made some invalid calls cannot prevent them from making a valid call; neither is the defendant released from payment of a valid call because some previous invalid calls have been made. The demurrer admits that the calls were in excess, and therefore void. The effect of making an invalid call is that the Company cannot enforce it; and if a shareholder paid it without knowledge of its invalidity, he would be entitled to recover back his money, as paid under a mistake: but if he paid, knowing that the call was invalid, that would be payment of so much money, not as a call, but a voluntary payment. Whether the other shareholders pay invalid calls with or without knowledge of the circumstances, cannot affect the defendant or entitle him to resist a valid call: he has contracted to pay a portion of the capital which the Colonial legislature has authorized to be raised for the purposes of the Company. [*Pollock*, C. B.—Why are the shareholders to judge whether a call is a valid or void? The directors may declare it void, but so long as they allow it to remain, it is, as against them, a valid call.] A shareholder who has paid a void call would be entitled to set it off against a valid call, in the same way that money received under an invalid rate is applied in discharge of a valid one. [*Martin*, B.—If the money could not be recovered back, it could not be set off.] The defendant has not paid the previous calls, neither does it appear that the directors have done anything under them. The principle on which the

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Company would be precluded from enforcing this call is that of estoppel, which does not arise here.

POLLOCK, C. B.—We are all of opinion that this is a bad replication. It does not state the matters necessary to give effect to the point which the pleader apparently intended to raise. Without going at length into the subject, it appears to me that the remarks of the Court in the course of the argument are well founded. For myself, I think that as against the Company, so long as a call remains on their proceedings and is not withdrawn or renounced, it is difficult to say that it is not a call. The course which may consistently with the record have been adopted, is not one in accordance with the proper conduct of the affairs of a Company. The directors make a void call, and then they make another call without giving any notice that the former call was void. It would be reasonable that they should get rid of the void call before they made another. That however, though a matter worthy of consideration, is not the ground of my decision. I think that the replication does not state enough to shew that the previous calls were void, and that on that ground it is bad.

MARTIN, B.—I also think that the replication is bad. I protest against being supposed to express an opinion that, if a void call is made, the directors have no power to remedy that—my impression is otherwise. I regret that we are troubled with these points, which are mere matter of words; but, dealing with such a subject, it seems to me that this replication is bad. By one of the clauses set out in the declaration, the directors are authorized “from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall deem necessary:

provided that thirty days' notice at the least be given of such call, and that no call exceed the prescribed amount to be determined therefor in the special Act, nor made at a less interval than two months from the previous call." That is a power given to the directors, subject to a proviso. The defendant says, in answer to the declaration, "that the directors made more calls for money and to a greater amount than were prescribed by the said Acts, and that the said call was a call made in excess of the calls by the said Acts empowered to be made, and not otherwise." It would have been better to have pleaded "never indebted," but the pleader has not thought fit to adopt that course, and if the plaintiffs had traversed the allegation that the call was made in excess, the parties might have gone to trial on that issue. Instead of that, the plaintiffs reply matter which, under the old system of pleading, would have been bad as an argumentative traverse of the facts stated in the plea. If a party, instead of making a direct traverse, proceeds to traverse argumentatively and artfully, he must give a complete answer, so that if it were proved he would be entitled to the verdict. This replication is defective, inasmuch as it leaves a material point untouched. It says that the calls in the plea mentioned respectively, other than the call sued for, were not authorized by the said Canadian Acts or any of them, or otherwise, and were therefore void"—that would be satisfied by proving that the call was made after twenty-nine instead of thirty days' notice. The replication proceeds, "and that the call sued for in this action was not a call made in excess of the calls by the said Acts empowered to be made, *if* the said void calls are not reckoned as calls." The introduction of the word "if" into a pleading is certainly novel, and was unknown before the Common Law Procedure Act, 1852. A pleading should contain either affirmative or negative matter. It seems to

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me that this replication would be proved by evidence that the call was made within two months of a previous call, or without thirty days' notice. All that the replication goes on to allege is, that the defendant did not pay the void calls, or any of them. For the purpose of enabling the Company to make the call now sued for, it was their duty to direct attention to the previous call, so as to prevent the incongruity of a shareholder paying two calls, one of which was invalid. That is the common sense mode of proceeding, and ought to be adopted by railway Companies, where a call has been made which cannot be enforced and it becomes necessary to make another valid call. My objection to this replication is of a technical nature: it seems to me that it does not contain enough to make a good argumentative traverse. If the plaintiffs had simply traversed the allegation in the plea that the call was made in excess, the real question might have been tried and decided upon that issue.

WILDE, B.—I am also of opinion that the defendant is entitled to judgment; and upon this short ground, that the plaintiffs are empowered to call for a certain sum of money within the year, and no more. That is distinctly provided by the clause set out in the declaration. This call having been made, the defendant says, "You cannot make it, because you have already called for more than you are entitled to call for within the year." The plaintiffs answer, "That is very true, but those calls were void." The question then is, whether that is an answer as it stands, or whether the plaintiffs ought not to have shewn in some way that they were not calling for more money than could be lawfully demanded within the year. Now, though the previous calls might be void for want of some formality, the greater part of the money may have been paid, and, if so,

the plaintiffs would in fact be calling for more money than they were entitled to call for within the year. My objection to this replication is that it does not negative that state of things. I do not consider the objection to it as merely technical, and for this reason, that if we held the replication a good answer to the plea, and the issue went down to trial, the plaintiffs would succeed by shewing that the previous calls were invalid, although in fact they had received the greater part of the money called for, and would thus be enabled to obtain more money within the year than the statutes allowed them. Therefore it seems to me that this is not a mere formal objection; for the Company, by saying that the calls were void, without saying that they have not taken the benefit of them, would be in a position which the statutes never intended. I think that it is important that the replication should shew in some way that the Company have not had the benefit of the calls.

My brother *Channell*, who has left the Court, desired me to say that he is of the same opinion.

Judgment for the defendant.

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READ, Appellant, v. STOREY, Respondent.

Jan. 12.

THIS was a special case stated by two justices pursuant to the 20 & 21 Vict. c. 43, s. 2.

At a petty session held at the Town Hall of Wincanton, on the 27th of August, 1860, a complaint was preferred by W. Storey, the respondent, a sergeant of police, against Richard Read, the appellant, under the 13th section of the 3 & 4 Vict. c. 61, charging that the appellant did, on the 25th of July, at Wincanton, sell beer by retail, without a

The 3 & 4 Vict. c. 61, s. 13, which imposes a penalty on persons selling beer by retail without a license, applies to persons selling beer at one penny halfpenny the quart.

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license; and the appellant was convicted and ordered to pay a fine of 1*s.*

At the hearing it was proved by the complainant that, on the 25th of July, he went to the appellant's house and called for a pint of beer, with which he was served, and that he paid three farthings for it; and further that the appellant had not a license to sell beer, but that he had a board up with the inscription upon it "Table beer sold here."

The appellant did not deny that he sold beer of the denomination mentioned in the statute 42 Geo. 3, c. 38, s. 18, viz., beer at and after the *rate of 1½*d.* a quart*. The magistrates, being of opinion that a license was necessary for the sale of beer at 1½*d.* a quart, convicted the appellant.

The question submitted by the magistrates was whether, upon the true construction of the 42 Geo. 3, c. 38, s. 18, 3 & 4 Vict. c. 61, s. 13, 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85, s. 17, a license was requisite for the sale of beer at a price not exceeding 1½*d.* a quart.

Theodore Thring, in support of the conviction (*a*).—The 3 & 4 Vict. c. 61, s. 13, which imposes penalties on persons selling beer by retail without a license, applies to persons selling beer at 1½*d.* a quart. The argument on the other side is that the 42 Geo. 3, c. 38, s. 18, which prohibited any person from retailing beer at any higher price than 1½*d.* the quart, without obtaining a license as a common alehouse keeper, left persons at liberty to retail beer at 1½*d.*, and that the 3 & 4 Vict. c. 61 applied only to persons to whom the earlier Act related. Until the passing of the 1 Wm. 4, c. 64, no person, except keepers of inns, alehouses and victualling houses, was licensed to sell beer.

(*a*) In Michaelmas Term, Nov. 1861, *well*, B., *Channell*, B., and *Wilde*, 21. Before *Pollock*, C. B., *Bram-* B.

That Act, which is a new enactment not referring to the previous Acts relating to the sale of beer, empowered all householders (except those specially excepted) to take out licenses for the sale of beer, and, by the 7th section, it is enacted that, if any person, not duly licensed to sell beer as the keeper of a common alehouse or victualling house, shall sell *any beer* by retail without having an excise retail license, he shall forfeit 20*l*. That applies to all beer. No distinction, such as is to be found in the preceding Acts, is drawn between table beer and other beer, but in section 32 it is enacted that the word "beer" shall be deemed to include beer, ale and porter. The 29th section, which contains the exemption, does not contain any provision permitting unlicensed persons to continue to sell beer at 1½*d*. a quart. The 4 & 5 Wm. 4, c. 85, which empowered the Commissioners to grant licenses for the sale of beer not to be consumed on the premises, imposed further restrictions on the sale of beer by retail, by requiring persons applying for licenses to sell beer to be drunk on the premises to deposit, with the Commissioners of excise, certificates of good character. The policy of that Act was to restrict the sale of beer to be consumed on the premises unless under an alehouse license. The 17th section, which imposes the penalty, and the 19th section which defines what "is a selling of beer by retail," apply to the selling of beer of any kind without reference to price. The 3 & 4 Vict. c. 61, by section 1, provides that no one is to have a license unless he is the resident holder of the house in which he applies to be licensed. Section 11 empowers the officers of excise to enter any house licensed for the retail of beer, and to make search for wine and spirits and sweets. Then comes the 13th section, which enacts that if any person, not being duly licensed to sell beer, shall retail any beer, either to be consumed in or upon the premises or off the pre-

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mises where sold, without being duly licensed, he shall forfeit 5*l*. It is submitted that the exemption in the 42 Geo. 3, c. 38, s. 18, is impliedly repealed by the subsequent Acts. The 1 Wm. 4, c. 64, and the subsequent Acts, now regulate the sale of beer by retail by all persons except by inn-keepers under excise licenses. The 9 Geo. 4, c. 61, consolidated into one Act the several previous Acts relating to the sale of beer by persons keeping inns, alehouses and victualling houses; and section 17 provides that no excise license for the sale of excisable liquor by retail shall be granted, except to a person who shall have obtained from the justices a licence under that Act. It is impossible to say that the exemption in the 42 Geo. 3, c. 38, s. 18, is compatible with the language of the later Acts; and, that being so, the earlier enactment must be deemed to be repealed: *The Attorney General v. Newman* (a), *O'Flaherty v. McDowell* (b). The 12th section of the 3 & 4 Vict. c. 61 must be deemed to be surplusage. But it is possible to suggest a reason for its enactment. Prior to the passing of the 3 & 4 Vict. c. 61, there were a number of houses at which beer was sold at 1½*d*. a quart, and an order of the board of excise had given the owners a virtual exemption from penalties, because, prior to the 3 & 4 Vict. c. 61, the officers of excise were the only persons who could initiate prosecutions for such offences.

Scotland, for the appellant.—From the 5 & 6 Ed. 6 till the passing of the 42 Geo. 3, c. 38, no person not being the keeper of an inn, alehouse or victualling house, was entitled to sell beer by retail, except during the time of fairs, in booths at such fairs. Alehouse keepers were required, by the 5 & 6 Ed. 6, c. 25, to enter into recognizances against the using of unlawful games, and for the mainte-

(a) 1 Price, 438.

(b) 6 H. L. 142.

nance of good order in their houses. The 42 Geo. 3, c. 38, introduced an exception. The Act was passed mainly for the purpose of regulating the duties of brewers. Sections 9, 10 and 11 make provisions with respect to the casks in which table beer is to be kept, and for marking such casks. Section 17 provides that persons selling table beer in a larger quantity than one gallon at a time shall make an entry at the office of excise of the place for keeping, storing or selling such beer. The 18th section enacts that no person, not being a common brewer, shall be allowed to retail beer at any greater or higher price than $1\frac{1}{2}d.$ the quart, without first entering into a recognizance and obtaining a license as a common alehouse keeper. That gave a permission to persons to sell beer at $1\frac{1}{2}d.$ the quart or a less price. [*Wilde, B.*—There was in existence a system that everybody who sold beer should have an alehouse license, which is quite distinct from the excise license under the 48 Geo. 3, c. 143 (a). The 18th section of the 42 Geo. 3, c. 38, seems to have imposed an additional penalty on any person selling strong beer without an alehouse license.] The statute is for the protection of the revenue; and the 18th section is that which would point out to the Commissioners the persons to whom licenses were to be granted. The 9 Geo. 4, c. 61, is simply a police Act. Down to the passing of the 1 Wm. 4, c. 64, every person selling beer required an alehouse license. If, at the time of the passing of the 1 Wm. 4, c. 64, persons might sell this small beer, the two Acts may well stand together. It would appear from the preamble that the object of the 1 Wm. 4, c. 64, was to extend to other persons the privileges previously possessed by keepers of inns, alehouses and victualling houses. It does not appear that it was intended to take away any existing right to sell beer, but

(a) Compare 44 Geo. 3, c. 98, Sched. A.

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simply to throw open the beer trade. It was expected that the 1 Wm. 4, c. 64, would have received the Royal assent before the 1 Wm. 4, c. 51; and the last mentioned Act, by section 22, enacts that nothing in the 1 Wm. 4, c. 64, shall affect the licenses required by law to be taken out by brewers of and dealers in beer and persons keeping common inns, alehouses, &c. [*Wilde, B.*—The meaning is obvious, viz., that the statute under which beerhouses were created was not to interfere with the licenses to be taken out by common brewers or persons keeping inns.] The 12th section of the 3 & 4 Vict. c. 61 seems to shew that the legislature recognized the existence of the privilege of selling beer at 1½*d.* the quart, without a license. The 11th section gives a power to enter licensed houses, and, if *no beer* could be sold except by persons holding licenses, the 12th section would be wholly unnecessary. The words “beer, ale and porter,” in the interpretation clause, s. 32, of the 1 Wm. 4, c. 64, do not necessarily include “table beer.”

Thring, in reply.—The 5 & 6 Ed. 6, c. 25, and the 26 Geo. 2, c. 31, regulated the sale of beer by retail at the time of passing of the 42 Geo. 3, c. 38. The effect of the 18th section is merely to impose an additional penalty on the sale of strong beer without an alehouse license, and does not create any exemption. The beer retailed at 1½*d.* the quart is described as “beer” in the 18th section of the 42 Geo. 3, c. 38, and not as “table beer,” though that expression is found in the preceding section.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case which was an appeal from the decision of a magistrate who had convicted the defendant

for selling beer without a license to sell, although the beer was at the price of $1\frac{1}{4}d.$ a quart, we are of opinion that the conviction should be affirmed. The case is clearly within the 13th section of the 3 & 4 Vict. c. 61, that is to say, the defendant has sold beer without a license for so doing. It is therefore for him to shew some exception from, or qualification of, the enactments in that section which will exempt him from its operation.

Now he relies on the preceding section which speaks of houses kept for the sale of beer at a penny half-penny or less the quart, and of the seizure of beer *they are not entitled* to sell. This, it is said, assumes there is some beer they are not entitled to sell, and as the previous section (11) applies to licensed beerhouses, section 12 must be taken to apply to unlicensed beerhouses, and so it appears such persons may sell some beer, which can only mean beer of the price at which the defendant sold. The section will not bear a critical examination, but probably is intended to apply to houses, not licensed at all, but kept for the sale of beer at the rate of $1\frac{1}{4}d.$ or less a quart, and no other, and to authorize the seizure of some quality of beer.

But, assuming that to be the case, we think it is not enough to control the express words of the next clause, which, in terms, comprehends *all beer*. There is no enactment like that in section 12 in the original statute of 1 W. 4. c. 64, and it is clear therefore that, before the 3 & 4 Vict. c. 61, persons selling beer at $1\frac{1}{4}d.$ or less a quart, and not licensed, would have been subject to a penalty under the 1 Wm. 4, c. 64, and the succeeding Sale of Beer Acts. The assumption therefore, in sect. 12 of the 3 & 4 Vict. c. 61, that there is beer which a person may be entitled to sell, though not licensed (if there is such an assumption), is erroneous, and the section certainly cannot be treated as an *enactment* that

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such beer may be sold. Section 12 was probably introduced in relation to the then state of things, viz., that there were places not licensed at which beer was sold at the rate of $1\frac{1}{4}d.$ or less a quart, and it was as necessary to give a right to excise officers to enter and search there, as in licensed houses.

It was argued that the 42 Geo. 3, c. 38, s. 18, which prohibits every person, not being a common brewer nor licensed alehouse keeper, from selling beer "at any higher rate than $1\frac{1}{4}d.$ a quart," in effect legalized the sale of the cheap beer without any license. It is to be observed that all that that section does is, not to permit such sale without a license, but to except it from the additional penalty there mentioned. Even if legalized by the 42 Geo. 3, c. 38, it really may have been intended by the 1 Wm. 4, c. 64, and subsequent Acts, including the 3 & 4 Vict. c. 61, the Act in question, to apply their enactments to all beer, strong and weak, there being in their passing less need to facilitate the sale of cheap beer; and possibly it being thought right that the new class of beer sellers, paying a license, should be protected from the competition of the table beer sellers: but we need not speculate on the objects of the legislature. The enactment prohibiting the sale of beer without a license is plain, and no exception ought to be implied to it without strong reason, and we see none. We are therefore of opinion that the conviction was right.

Conviction affirmed.

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JAURALDE v. PARKER.

Jan. 16.

DECLARATION on a writ issued against a garnishee under the 64th section of the Common Law Procedure Act, 1854.—The declaration set out the writ as follows:—Victoria, &c., to Benjamin Parker, greeting. We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you appear in our Court of Exchequer of Pleas, to shew cause why Nicassio Jauralde should not have execution against you for the sum of 200*l.*, being the amount of a debt due from you to Lodovick Oltman, towards satisfying the sum of 1008*l.* 17*s.* 6*d.*, which, on the 30th day of December, 1859, the said N. Jauralde, by a judgment of our Court of Exchequer of Pleas, recovered against the said Lodovick Oltman, and for costs of suit in this behalf; and take notice that in default of your so doing the said N. Jauralde may proceed to execution. Witness, &c.—The declaration then set out the indorsements on the writ, and after stating that Benjamin Parker had appeared to the said suit, and that the debt due from him to Lodovick Oltman was for goods sold and delivered, &c., concluded:—And the said Nicassio Jauralde prays that execution may be adjudged to him accordingly for the said 200*l.*, and for costs of suit in this behalf.

A judgment creditor, who has taken his debtor in execution under a *ca. sa.*, cannot attach his debts under the garnishment clauses of the Common Law Procedure Act, 1854.

Plea.—That before the issuing of the said writ the plaintiff sued out of the said Court upon the said judgment a writ of execution, called a *capias ad satisfaciendum*, to take the body of the defendant in the said action to satisfy the plaintiff the sum recovered by the said judgment and interest; and that the plaintiff has, before the issuing of the said writ of attachment, caused the defendant to be taken in

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execution to satisfy him the sum recovered by the said judgment and interest; and that the defendant has since been, and still is, in execution at the suit of the plaintiff to satisfy him the sum recovered by the said judgment and interest.

Demurrer, and joinder therein.

Day, in support of the demurrer.—The detention of a debtor under a writ of *ca. sa.* does not prevent the creditor from resorting to any other remedy for the recovery of his debt. It is true that, in *Beard v. M'Carthy (a)*, *Littledale, J.*, said:—"That taking the defendant in execution is the same as if the defendant had paid the debt and costs; and, consequently, that the defendant is not bound to allow his costs to be set off against the debt and costs recovered by the judgment." That position however was expressly overruled by the Court of Common Pleas in *Thompson v. Parish (b)*, which decided that interlocutory costs recovered by a defendant in the same suit might be set off against the judgment debt for which he was in execution. The ground of that decision was that the taking a debtor in execution does not extinguish the debt. *Taylor v. Waters (c)* is an authority to the same effect. [*Pollock, C. B.*—Suppose a creditor, who had a lien on the goods of his debtor, took him in execution, would that destroy the lien?] It is submitted that it would not. By the 126th section of the Common Law Procedure Act, 1852, a written order under the hand of the attorney by whom a *ca. sa.* shall have been issued shall justify the sheriff or gaoler in discharging the party in custody under the writ, "but such discharge shall not be a satisfaction of the debt unless made by the authority of the creditor." If the mere taking a debtor in execution

(a) 9 Dowl. P. C. 136.

(b) 5 C. B., N. S. 685.

(c) 5 M. & Sel. 103.

were a satisfaction of the debt, that provision would not have been made. [*Pollock*, C. B.—If a creditor takes the body of his debtor under a ca. sa., he cannot afterwards seize the debtor's goods under a fi. fa.] It is conceded that at common law, the taking a judgment debtor in execution prevented the creditor from proceeding against his property or enforcing any other remedy: *Cohen v. Cunningham* (a), *Burnaby's Case* (b). But the 61st section of the Common Law Procedure Act, 1854, enables a Judge, upon the application of a judgment creditor, upon affidavit that the judgment is *still unsatisfied*, to order that all debts owing or accruing from any other person to the judgment debtor shall be attached to answer the judgment debt. The word “unsatisfied” must receive its ordinary legal acceptation, and therefore, unless this debt is satisfied, the plaintiff is entitled to proceed under that enactment. [*Martin*, B.—In *Morgan v. Cubitt* (c), *Parke*, B., said, “Execution by a ca. sa. is so far a satisfaction of the debt, that the creditor cannot avail himself of any other remedy, and if he allow the creditor to escape, the debt is satisfied.”] That shews that the detention is not a satisfaction. [*Wilde*, B.—The construction contended for would be at variance with the common law, whilst the Act might be construed so as to be consistent with it.] The object of the statute was to give creditors an additional remedy for the recovery of a judgment debt.

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Gibbons, for the defendant, was not called upon to argue.

POLLOCK, C. B.—The case appears to me very plain. It is conceded that if a judgment creditor takes his debtor in execution, under a ca. sa., he cannot afterwards have execution against the debtor's property, and I am of opinion that

(a) 8 T. R. 123.

(b) 1 Str. 653.

(c) 3 Exch. 612.

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the 61st section of the Common Law Procedure Act, 1854, merely intended to place *debts* in the same position as other property which might be taken in execution. It would be monstrous to hold, without a single expression in the Act to that effect, that a creditor may resort to a debt to satisfy his judgment when he cannot resort to a chattel. I therefore think that the plea is good, and that the defendant is entitled to judgment.

MARTIN, B.—I also think that the plea is good. Similar cases have come before the Judges at Chambers, and they have invariably expressed the same opinion.

WILDE, B., concurred.

Judgment for the defendant.

Jan. 12.

HAZARD v. MARE.

To an action of debt the defendant pleaded, that after the accruing of the debt he became bankrupt, and that, after the bankruptcy, he and P. R., in pursuance of the 230th

DEBT for goods sold and delivered.

Plea.—That after the accruing of the causes of action, and after the coming into force of the Bankrupt Law Consolidation Act, 1849, &c., the defendant was a trader, &c., and then, and for six months next preceding the time of filing the petition, carried on business as such trader within the jurisdiction of her Majesty's Court of Bankruptcy, in section of the Bankrupt Law Consolidation Act, 1849, made an offer of composition, which was accepted by nine-tenths in number and value of the creditors, the offer being to pay 4s. in the pound in full satisfaction of his debts, such composition to be paid to all the creditors in cash within fourteen days after the second sitting, to be appointed under the 280th section: that the Court ordered the adjudication to be annulled: that P. R. joined in making the offer of composition, in consideration of all the effects of the defendant being assigned to him by the defendant: that the defendant and P. R. paid the composition to the other creditors, and that the defendant had always been ready and willing to pay, and brought into Court the amount of the composition on the plaintiff's debt ready to be paid to him.—*Held*, that the plea was bad for not shewing a payment or tender within the fourteen days.

the district of and acting in London, and being unable to meet his engagements with his creditors, and being desirous of laying the state of his affairs before them, under the superintendence and control of the Court, and of submitting himself to the jurisdiction thereof, and then having assets ready to be produced to the Court, to the value of 200*l.* and upwards, duly, and according to the provisions of the same Act, presented his petition to her Majesty's Court of Bankruptcy for the district aforesaid, setting forth the true cause of such inability as aforesaid, praying that his person and property might be protected from all process; and in order that such proposal as he might be able to make, or such modification thereof as by three-fifths in number and value of his creditors might be determined, might be carried into effect under the superintendence of the said Court, according to the provisions of the said last mentioned Act, such petition being in the form mentioned in Schedule A., &c. (The plea then stated, that the petition was verified by affidavit: that the petition, with the affidavit annexed, was duly filed: that all things happened to give jurisdiction to the Court to act in the matter of the petition: that a proposal by the defendant for the future payment of his debts was duly made: that such proposal was not assented to at the first private sitting or any adjournment thereof: that all things happened necessary to authorize and empower the Court to adjudge the defendant a bankrupt: that the Court, after such private sitting, adjudged the defendant a bankrupt and adjourned the proceedings into the public Court, &c.: that assignees were appointed and notices of adjudication given and published: that meetings were appointed for the purposes of the defendant surrendering: that the defendant surrendered himself and submitted himself to be examined touching the disclosure and discovery of his debts. The plea then proceeded as follows).—In the last of the said meetings, on the

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day and at the place appointed in that behalf, the defendant finished his examination on oath before the said Court, and upon such examination made a full disclosure and discovery of his estate and effects; that all meetings, notices, and things were held, given, done, and executed, necessary to entitle the defendant to call and hold the meetings hereinafter mentioned; that after he had so passed his last examination, within the true intent and meaning of the statute, the defendant called a meeting of his creditors, according to the provisions of the statute, whereof, and of the purport whereof, twenty-one days' notice was duly given in the *London Gazette*, according to the true intent, &c.; that such meeting was accordingly held at the time and place and in all respects according to the said last mentioned notice, and at the last mentioned meeting the defendant and one P. R. then made an offer [in writing and signed by the defendant and the said P. R. (a)] of composition to all the defendant's creditors within the true intent and meaning of the statute, and then offered and agreed to pay to all such of the creditors of the defendant as had received a dividend of 1s. 6d. in the pound, already declared under the said bankruptcy, a composition at the rate of 2s. 6d. in the pound on the debts respectively due to them from the defendant, in full satisfaction and discharge of such debts, and to pay and satisfy all such of the creditors of the defendant as had not yet (b) received the amount of 1s. 6d. in the pound then already declared, a composition at the rate of 4s. in the pound on the debts respectively due to them from the defendant in full satisfaction and discharge of such debts, such composition to be paid to all the said creditors in cash within fourteen days after the second sitting to be appointed under the 230th section of the said Act, if

(a) These words were inserted
when the plea was amended.

(b) Struck out when the plea
was amended.

nine-tenths in number and value of the creditors present at such sitting should agree to accept such offer, and nine-tenths in number and value of the creditors, within the true intent and meaning of the statute, assembled at such last mentioned meeting, which was duly held in all respects according to the said Act, agreed to accept the same, &c.: that all things then occurred and happened and existed necessary to render the same a valid agreement within the true intent, &c.; that thereupon another meeting, for the purpose of deciding upon such offer, was appointed to be held according to the provisions of the said statute, as by the said statute is specified and required; that notice thereof was duly given; that the meeting was afterwards accordingly duly held at the time and place in all respects according to the said notice and the said statute; that at such second and last meeting nine-tenths in number and value of the creditors of the defendant, &c., then being present at, &c., did also agree to accept such offer within the true intent, &c.: that thereupon the said acceptance of the said offer having been duly testified by the last mentioned creditors in writing, &c., and all sums directed by the Court to be paid having been paid and discharged, the Court, upon the application of the defendant, then duly made, by its order dated the 24th of November, 1857, and sealed with the seal of the Court, after reciting that such application, as last aforesaid, had that day been made to the Court by the bankrupt, it was, upon reading the order of bankruptcy whereby adjudication was made, and also the certificate made in pursuance of the rules and order of the Court relating to composition after bankruptcy, and also the order ordering composition to be paid, ordered that the petition of the bankrupt should be dismissed, and that the adjudication of bankruptcy against the defendant should be and it was thereby annulled.—Averments: that all things occur-

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red and existed necessary to render the said order valid and effectual, *and the aforesaid agreement and acceptance of the said offer binding and obligatory upon the plaintiff (a)*; [and the same was so made and became so valid and effectual long before the commencement of this suit: that P. R. joined in making the said offer of composition in consideration of the defendant having agreed to convey to the said P. R. all the assets of the defendant's estate then in the hands of or belonging to the assignees under the bankruptcy, or which might become vested in the defendant upon a supersedeas of the bankruptcy being issued, of which the said creditors at such meetings had notice, and which conveyance was accordingly duly made and executed by the defendant to the said P. R. after the said proposal had been accepted by the said creditors: that the plaintiff, before the making and presenting of the petition in this plea first mentioned, and making of the

(a) Struck out, and the words below in brackets substituted, when the plea was amended.

To the plea as it originally stood there was a replication, which, after setting out the offer of composition, &c., alleged that P. R. and the defendant did not, nor did any or either of them, within fourteen days after the said second sitting in the said offer mentioned, which period had elapsed long before the commencement of this suit, or at any time whatsoever, pay or tender to the plaintiff, or to any one on his behalf, the amount of the composition due and payable to the plaintiff as a creditor, according to the force, form and effect of the provisions contained in the Bankrupt Law Consolidation Act, 1848.

Demurrer and joinder.

This demurrer was argued in Easter Term (April 25) 1860, by *Hayes*, Serjt., for the defendant, and *Macanema* for the plaintiff, when, in addition to the cases cited on the second argument, *Taylor v. Pearce*, 2 H. & N. 36, and *Tindall v. Hubbard*, 2 C. B., N. S. 199, were cited. The Court asked if the defendant would bring the amount of the composition into Court; and it was ultimately arranged between the counsel that all proceedings should be stayed on payment of the amount of the composition, with interest and costs, within a week. The money not having been paid at the time stipulated, the Court ordered that the defendant should be at liberty to amend the plea on paying into Court the amount of the composition, &c.



said offer and of the said agreement, was a creditor of the defendant, within the true intent of the statute, for 270*l.*; that by means of the premises and by force of the statute, the said offer so proposed, and the said agreement so made as aforesaid, and the last mentioned order of the Court, became and were and are binding and obligatory on the said creditors of the defendant and upon the plaintiff, as such creditor, for the sum of 270*l.*: that the defendant and P. R. duly paid the said composition to the other creditors of the defendant, and have always been ready and willing to pay to the plaintiff the said composition on the said sum of 270*l.* And the defendant now brings into Court the sum of 61*l.* 2*s.* ready to be paid to the plaintiff, and says that the said sum of 61*l.* 2*s.* is sufficient to satisfy the plaintiff the said composition and all causes of action in respect thereof.]

Demurrer and joinder.

*Macnamara* (with whom was *Lush*) argued in support of the demurrer (a).—The plea is bad, because it does not state that the amount of the composition was paid or tendered to the plaintiff before action brought. It is not enough to allege that the defendant and P. R. were always ready and willing to pay the composition. The plea states an accord without satisfaction. In order to make the plea good, it should have averred that the money was paid or tendered to the plaintiff at the time provided for in the offer of composition, viz. within fourteen days after the second sitting: *Evans v. Powis* (b), *Oughton v. Trotter* (c). In the notes to *Cumber v. Mane*, 1 Smith Lead. Cas. 252 (d), referring to cases in which a debtor has induced a number of his creditors to accept a composition amounting to less than their

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(a) In Michaelmas Term, Nov. 12. Before Pollock, C. B., Bramwell, B., Channell, B. and Wilde, B.

(b) 1 Exch. 601.

(c) 2 N. & M. 71.

(d) 4th edition.



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entire demand, it is said:—"Nor will the debtor be entitled to the benefit of it, if he neglect to perform accurately what is to be done on his part. Thus he must tender the composition money on the appointed day, for, as Lord *Ellenborough* said in *Cranley v. Hillary* (a), the party to be discharged is bound to do the act which is to discharge him." It is not alleged that there was any agreement to accept the substituted liability of P. R. in satisfaction of the defendant's debt; and the 230th section of the Bankrupt Law Consolidation Act, 1849, does not provide for satisfaction by anything short of payment of the composition in cash. Here the discharge was conditional on payment or tender of the composition *within fourteen days* after the second sitting. The plaintiff was not bound to accept it except within that time, nor could the subsequent payment operate as satisfaction of his debt: *Walker v. Seaborne* (b), *Shipton v. Casson* (c), *Drake v. Mitchell* (d).

*Hayes*, Serjt. (with whom was *Griffiths*), for the defendant.—An agreement for a composition after bankruptcy operates as the substitution of a new contract for the original obligation of the debtor. It is true that in *Comyns's Digest*, tit. Accord B., it is laid down that an accord must be executed, "it is not good if he shews only a tender and refusal." An accord is considered an agreement which, as between debtor and creditor, is not intended to operate unless it is actually performed. Here, however, the body of creditors agree, the forbearance of each being a consideration for the forbearance of the others, and a third person becomes security for the payment of the composition. The 133rd section of the 6 Geo. 4, c. 16, did not interfere with the rights of persons not parties to the agreement:

(a) 2 M. & Sel. 120.  
(c) 1 Taunt. 526.

(b) 5 B. & C. 378.  
(d) 3 East, 251.



*Tuck v. Tooke* (a); and a creditor who held aloof was not bound. That was a defect which the 230th section was intended to remedy. It enacts that every creditor "shall be bound to accept of such composition so agreed to." A strict legal tender of the composition is not necessary. The debtor may not be able to find or make a tender to the creditor. Here it was part of the bargain that all the defendant's effects should be given up to P. R., which is stated to have been done with the knowledge of the creditors, and the bankruptcy was annulled. Therefore, neither the defendant nor the other creditors can be remitted to the position in which they previously stood. [*Bramwell*, B.—The adjudication is to be annulled "upon payment of such sum as the Court shall direct."] That does not refer to the payment of the composition, but of the expenses incurred under the petition and adjudication. In *Cork v. Saunders* (b), A., being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the then next Michaelmas; and it was provided that they would enter into an agreement to release the defendant from his debts on receiving such a composition as the produce of his effects would admit of being paid at that time. The defendant executed an assignment of his effects. At the next Michaelmas several of the creditors who had signed this instrument agreed that the business should be carried on by the trustees for a further time: it was held that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. The Court relied on the fact that the debtor could not be replaced in the same position

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(a) 9 B. &amp; C. 437.

(b) 1 B. &amp; Ald. 46.



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as before the assignment. [*Bramwell*, B.—There the creditor might have compelled the trustees to divide the proceeds; but can it be shewn that this agreement could be enforced by a creditor who did not assent to it?] It is a binding statutory agreement. [*Wilde*, B.—What is meant by the expression “bound to accept of such composition”?] It means, shall be accepted in lieu of the plaintiff's original right. *Cranley v. Hilliary* (a) and *Cooper v. Phillips* (b) only shew that the plea is no answer unless the defendant pays the amount of the composition into Court. The plaintiff's original right and a right to the composition cannot co-exist. In *Norman v. Thompson* (c), a plea of composition stated the defendant's readiness and willingness to pay the composition, and concluded by paying the amount into Court without any averment of tender before action, and it was held that the plea was good.—*Cockshott v. Bennett* (d), *Steinman v. Magnus* (e) and *Sibree v. Tripp* (f) were also referred to.

*Macnamara*, in reply.—The expression “bound to accept such composition,” in the 230th section, may mean bound to accept it if the conditions are performed. Here neither the plaintiff nor even the creditors who accepted the offer were bound to accept the compensation unless tendered within the fourteen days. If this were otherwise a creditor might be bound to accept it even after the lapse of many years. The defendant's property was not given up to his creditors, but only assigned to indemnify P. R. his surety; and the plaintiff was prejudiced by being deprived of the opportunity of having the defendant's property distributed under his bankruptcy. *Bradley v. Gregory* (g) and *Litt*.

(a) 2 M. &amp; Sel. 120.

(b) 1 C. M. &amp; R. 649.

(c) 4 Exch. 755.

(d) 2 T. R. 763.

(e) 11 East, 390.

(f) 15 M. &amp; W. 23.

(g) 2 Camp. 383.



ss. 342, 343, shew that the amount of the composition should have been tendered.

*Cur. adv. vult.*

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v.  
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The judgment of the Court was now delivered by

POLLOCK, C. B.—We think the plaintiff is entitled to judgment. The words at the end of the 230th section of the Bankrupt Law Consolidation Act, 1849, "*and every creditor of such bankrupt shall be bound to accept of such composition so agreed to,*" in our opinion, are only important to bind the non-assenting creditors, but they bind them as much, neither more nor less than the assenting creditors. The question then is, what is the position of the assenting creditors? And, to determine that, the words cited may be left out of consideration.

Now, it is to be observed that the only consequence the statute attaches to the agreement to accept a composition (beside the binding of non-assenting creditors) is, that the Court shall annul the adjudication and supersede or dismiss the fiat or petition. The effect of the agreement, as a defence or answer to the original claim, is not expressed, but left as a common law consequence. The statute may be read therefore as if it had been, "if all the creditors agree to accept a composition, the adjudication shall be annulled and the petition dismissed." But if this had been a mere voluntary agreement by all creditors, it is clear that payment or tender, or attempt to pay or tender, would have been necessary to make a defence to the original claim. The agreement set forth in the plea is distinct, that the *sum* agreed to be paid, and not the *agreement* to pay it, was to be taken in satisfaction of the original debt. Then *Evans v. Powis* (a) is in point against the defendant.

(a) 1 Exch. 601.



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It is said this leaves the debtor at the mercy of a recalcitrant creditor, whose abode is not known and who avoids a tender. Even if so, we think we ought not to construe the act of parliament otherwise than we do. But the objection is imaginary; practically such difficulties will not occur. Debtors generally know where their creditors live; and we incline to think that a formal tender might not be required if a reasonable effort to pay were made; or at all events the composition might be made payable within a time after notice or demand, or some other term might be introduced to protect the debtor. But mischief may be shewn to exist to the creditors if the defendant's argument be well founded. Suppose the creditor does not know of the bankruptcy. Suppose he does not know of the composition and brings his action; and suppose further (as may be the case), that the debtor is no party to the offer to compromise but only his "friend," might he not reasonably complain that he brought a fruitless action owing to his debtor giving him no notice. We say a fruitless action because, if the new agreement is a discharge of the original claim, the defendant may set it up without paying money into Court. Or suppose the debt is contested by the debtor or the "friend" who offered the compromise, what is the creditor to sue for? Or suppose the parties will not or cannot pay the composition, is the plaintiff to have judgment for the amount of the composition only? Without, therefore, saying that there is no objection to the plaintiff's construction or that the defendant's is open to more, we think that there are at least difficulties in each, and certainly not enough in the plaintiff's to warrant us in adding a term to the statute, as we think the defendant's argument does.

Judgment for the plaintiff.



1861.

SARAH RILEY, Administratrix of JOHN RILEY, v. JOSEPH BAXENDALE and Others. Jan. 15.

**DECLARATION.**—Sarah Riley, administratrix &c. of John Riley, sues Joseph Baxendale and J. H. Baxendale, for that, in the lifetime of the said John Riley and before and at the time of the committing of the grievances, &c., John Riley had become and then was the servant of the defendants, to wit a porter, on the terms that the defendants should take due and ordinary care not to expose the said John Riley to extraordinary danger and risk in the course of his said employment; yet the defendants did not take due or ordinary care not to expose the said J. Riley to extraordinary danger and risk in the course of his said employment; and so carelessly, negligently and improperly conducted themselves in that behalf, that the said John Riley was, whilst employed as such servant, exposed to extraordinary danger and risk in the course of his said employment; and was, by and through the mere carelessness, negligence, improper and wrongful conduct of the defendants in that behalf, and by being exposed by them to extraordinary danger and risk as aforesaid, struck by a railway truck and killed; whereby the plaintiff, his widow, lost his society, assistance and support, and was put to and incurred expense by reason of his death, &c.

Pleas.—First:—Not guilty. Secondly:—That the said John Riley was not at the time of the alleged grievances a servant of the defendants on the terms in the declaration mentioned.

risk as aforesaid, struck by a railway truck and killed.—*Held*, that no such contract could be implied from an ordinary contract of service.

A declaration, by the administratrix of J. R., alleged that J. R. was the servant of the defendants, on the terms that the defendants should take due and ordinary care not to expose the said J. R. to extraordinary danger and risk in the course of his said employment; yet the defendants did not take due and ordinary care not to expose, &c., and so carelessly conducted themselves that J. R. was, while employed as such servant, exposed to extraordinary danger and risk in the course of his employment, and was, through the carelessness and wrongful conduct of the defendants, and by being exposed to extraordinary danger and



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 v.  
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At the trial, before *Pollock*, C. B., at the London Sittings after Michaelmas Term, it appeared, from the opening statement of the plaintiff's counsel, that the deceased John Riley was a porter in the service of the defendants who are carriers, and was employed at the defendants' place of business at Haydon Square, adjoining the terminus of the Blackwall Railway. The trucks, as they arrive, are let down from the railway into the defendants' warehouse by an hydraulic apparatus. For the purpose of unloading or shunting the trucks they are placed on a turntable. When the turntable was originally placed in the warehouse there was ample room to work at it; but afterwards Lancashire and Yorkshire trucks were employed, which were larger and could not be safely turned on the table unless by a careful person. On the 12th of March, 1860, one of these trucks had been let down and the deceased was attempting to turn it, when he was struck by it and crushed between the buffer and the wall. It was suggested that it was negligence in the defendants not to have provided safe tackle and competent servants. The learned Judge intimated that in his opinion the facts stated, if proved, would not shew any liability on the part of the defendants; and the plaintiff was nonsuited.

*Montagu Chambers* now moved to set aside the nonsuit and for a new trial.—The defective arrangement of the turntable is evidence of negligence for which the defendants are liable: *Vose v. The Lancashire and Yorkshire Railway Company* (a), *Tarrant v. Webb* (b). [*Martin*, B.—The hiring was simply an ordinary hiring. Whether the defendants are liable or not, there is no such contract as that declared on.] In *Wiggett v. Fox* (c), it is said that “the servant undertakes, as between him and his master, to run

(a) 2 H. & N. 728.

(b) 18 C. B. 797.

(c) 11 Exch. 832. 838.



all ordinary risks of the service." That shews that there is an implied contract between master and servant as to the risks of the service. If the servant refused to incur or go on with such risk, an action would lie against him founded upon the contract. In *Roberts v. Smith* (a) the declaration was similar to that in the present case, and no objection was taken to it. At most the objection is only a formal one.— (He also referred to *Hutchinson v. The York, Newcastle and Berwick Railway Company* (b), *Brydon v. Stewart* (c) and *The Bartonshill Company v. Reid* (d).)

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 v.  
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MARTIN, B.—I am of opinion that there ought to be no rule, on the ground that there is no such contract as that set out in the declaration. There has been a series of cases in which the duty of the master has been improperly declared upon as a contract. This imposes a difficulty on the defendant by making it impossible for him to demur, and all that he can do is to deny the contract. I am of opinion that on the hiring of a servant no such contract as this is to be implied; there is a mere contract of service. No such contract as that stated in the declaration really existed, and the liability of a master for injury to his servant in the course of his employment is one of a different character.

WILDE, B.—I am of the same opinion. In the present case there was not, as a matter of fact, any such contract as that alleged. But it is said that such a contract must be implied as matter of law. But a contract to be implied can only be one which arises out of some duty so generally understood that it leads to the implication of a contract. I should be slow to decide that a new contract of this sort is to be implied. It does not follow that wherever a duty

(a) 2 H. &amp; N. 213.

(c) 2 Macqueen, 30.

(b) 5 Exch. 343.

(d) 3 Macqueen, 266.



1871. A contract upon a person the law will imply a contract on his  
part in person. That is sufficient for the decision of  
this case.

1872.

JUDICIAL C. 3.—I agree with the rest of the Court that there should be no rule. One of the points which I decided was that there was no such contract as that declared upon. Generally speaking, a mere duty cannot be turned into a contract, and great inconvenience would result if we were to permit it to be declared in as such. If the obligation had been alleged as a duty, the defendant might have demurred. But when it is alleged as a contract the defendant cannot demur, because it is possible that there may be such a contract in point of fact. If I had been applied to at the trial for leave to amend, I should have given no encouragement to the application. I think that the doctrine established by *Preston v. Fowler* & might not to be stretched upon. Servants are often far better judges than their masters of the dangers incident to their employment, and whether their fellow servants are trustworthy persons.

Rule Discharged.

L. J. M. & W. :

JULY 25

THOMAS v. EVERARD.

A bill of  
separation  
between  
husband and  
wife contained  
a covenant  
by the hus-  
band that he

would not molest or disturb the wife in her person or manner of living, nor interfere with or attempt her to interfere with him, &c., and a covenant by H. that the wife should not at any time thereafter molest or disturb the husband, &c. The bill was by any means withdrawn either by Ecclesiastical sentence or otherwise, it is in any other manner endeavour to enforce the plaintiff or defendant with her to enforce any restriction of personal rights, &c. — *Held*, that a suit by the wife in the Divorce Court for a judicial separation was not any breach of the covenant not to molest or disturb the husband.



recited, and that a marriage had been some time since duly solemnized between the parties thereto of the first and second parts, &c. (The indenture then recited that there were issue of that marriage six children under the age of twenty-one years; that a post nuptial settlement had been executed, whereby certain property of Ann Thomas was secured for her separate use for life, and after her death for the use of her children, but of which property the plaintiff was wrongfully possessed: that the plaintiff had left his wife and children and was living in Ireland: that proceedings were pending against the plaintiff, in the Court of Chancery in Ireland, for compelling the restitution and resettlement of the property: that proceedings had been threatened against the plaintiff in the Ecclesiastical Court for a divorce between him and his wife, and alimony for herself and children.) And further reciting that, in order to put an end to the suit or proceeding so pending as aforesaid, and also to prevent further litigation and expense, certain articles of agreement had been made and entered into by and between the several parties thereto, and the aforesaid persons, on the 11th day of November then last, whereby (amongst other things) terms had been settled and agreed upon for the refunding or securing the aforesaid trust monies and property, and making further provision for the future maintenance and benefit of the said Ann Thomas and her aforesaid children; and whereby also it had been arranged and agreed, on the requirement of the said Ann Thomas, that such deed of separation, with such additional provision for herself and children, should be made and executed between and by her and her aforesaid husband, as are hereinbefore respectively contained and set forth: It was witnessed that for effectuating the said last mentioned requisition and agreement, and in consideration of the covenants and agree-

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ments therein and hereinafter contained on the part of the said defendant and H. Everard respectively, and also in consideration of the sum of 5*s.* &c., the plaintiff, for himself, his heirs, executors, &c., did covenant, &c., with the defendant and H. Everard, their executors, &c., by the said indenture in manner following, that is to say, that she the said Ann Thomas might, from time to time and all times thereafter, live separate and apart from him the plaintiff as if she was sole and unmarried; and that she should be free from the power, command, restraint, control, authority and government of him the plaintiff, and should and might live and reside at such place or places and in such manner as to her should from time to time seem meet; and that he the plaintiff should not nor would molest or disturb the said Ann Thomas in her person or in her manner of living; nor at any time or times thereafter by any means, either by Ecclesiastical censures, or by taking citation or process, or by commencing or instituting any suit whatsoever, or otherwise howsoever, endeavour to compel her the said Ann Thomas to cohabit or live with him the plaintiff, or to enforce any restitution of conjugal rights, nor should nor would for that purpose, or otherwise, use any force, violence or restraint to the person of the said Ann Thomas, or sue or cause to be sued any person or persons whomsoever for receiving or entertaining her; but that she the said Ann Thomas might in all things live as if she were sole and unmarried, without the restraint or interference of him the plaintiff, or by any person or persons by or through his means, consent or procurement. And by the same indenture it was and is further witnessed that, in consideration of the covenants and agreements therein and hereinbefore contained on the part of the plaintiff, the said H. Everard and the defendant, for themselves severally and respectively and for their several



and respective executors, &c., did covenant, promise and agree with and to the plaintiff, his executors, &c., by the said recited indenture in manner following, that is to say, that she the said Ann Thomas should not at any time thereafter molest or disturb the plaintiff, or require by any means whatsoever, either by Ecclesiastical censure, or by taking out any citation or process, or by commencing or instituting any suit whatsoever, or in any other manner, endeavour to compel the plaintiff to cohabit or live with her the said Ann Thomas, or to enforce any restitution of conjugal rights, nor should require or by any means whatsoever endeavour to compel the plaintiff to allow her any further or greater or other alimony or maintenance than such as had been provided under and by virtue of the said therein and hereinbefore mentioned post nuptial settlement between them the plaintiff and Ann his wife. (Then followed a covenant by H. Everard and the defendant to indemnify the plaintiff against the debts of his wife, and all actions in respect thereof.)—Averments: that the plaintiff hath always observed, performed, fulfilled and kept all things on his part to be observed; and all things have happened, &c., to entitle him to maintain the action.—Breach: that the said Ann Thomas did molest and disturb the plaintiff, contrary to the said covenant of the defendant and in breach thereof, to wit, by citing the plaintiff and taking proceedings against the plaintiff in her Majesty's Court of Divorce, and in order to endeavour to procure a judicial separation between the plaintiff and his said wife Ann Thomas, and for that purpose the said Ann Thomas did in further breach of the said covenant petition and file in her Majesty's Court of Divorce a petition praying, amongst other things, for a judicial separation between the plaintiff and his said wife Ann Thomas, and which said petition and suit of the said

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v.  
EVERARD.



1861. *Ann Thomas* was by the said Court duly heard and dismissed and determined.  
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 v.  
 EVERARD. Demurrer and joinder therein.

*Day*, in support of the demurrer.—The words in the covenant “molest or disturb” do not include a judicial proceeding to obtain redress in respect of rights violated since the execution of the deed. If those words are to have a larger or wider interpretation than the mere protection of the husband against pecuniary claims of the wife, the covenant would be bad in law, as contrary to public policy. [*Channell*, B.—It is not suggested that the suit in the Divorce Court included an application for alimony.] Any covenant, the effect of which is to prevent a husband returning to his wife, or a wife to her husband, is void. [*Channell*, B.—The words “molest and disturb” must be construed with reference to the whole deed. There is an able note in Mr. Jarman’s edition of Bythewood’s Conveyancing (*a*), stating how far deeds of separation operate. *Martin*, B.—The words mean what they import, viz. an actual molestation or disturbance.] —He cited *Warrender v. Warrender* (*b*).

The Court then called on

*Needham* to support the declaration.—The words “molest and disturb” are sufficiently large to include a suit for a judicial separation. In order to ascertain the meaning of the covenant the whole deed must be read together. Its object was to put an end to all proceedings by the one party against the other. The deed contains a co-relative covenant by the husband. The fact that the deed provides for everything to which the wife would be entitled in a suit for a judicial separation, shews that the proceedings were vexa-

(*a*) Vol. 9, p. 544.

(*b*) 2 C. & F. 488.



tious, and consequently a molesting and disturbing of the plaintiff. The intention was that the deed should be a deed of peace. Moreover the declaration states that the suit was duly heard and dismissed, no doubt on the ground that the wife could obtain nothing more by a decree in the suit than she was already entitled to under the deed. [*Martin*, B.—The words “molest or disturb,” in that covenant, mean personal molestation or disturbance. There is a covenant that “the plaintiff should not nor would molest or disturb the said Ann Thomas *in her person or in her manner of living*,” nor by any means whatsoever compel her to live with him. Then the defendant covenants that “the said Ann Thomas should not at any time thereafter molest or disturb the plaintiff,” nor by any means whatsoever compel him to live with her. There is no covenant that the wife shall not institute a suit for a judicial separation. *Wilde*, B.—Possibly the proceedings in the Divorce Court may have included a claim for alimony, but no breach is alleged in that respect.]

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 v.  
 EVERARD.

Per CURIAM (a).—The plaintiff may have liberty to amend within a fortnight; otherwise judgment for the defendant.

Rule accordingly.

(a) *Martin*, B., *Channell*, B., and *Wilde*, B.



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Jan. 12

## STURTAN and Another v. KNOWLES and Others.

## HARRIS v. KNOWLES and Others.

Where the working of mines in however careful a manner has caused a subsidence of the adjacent land, the owner is entitled to recover in respect of damages to buildings thereon, although erected within twenty years, provided their weight did not contribute to the subsidence.

In 1833 a manufactory was erected on a close, and in 1841, and between that time and 1849,

the buildings were enlarged. In March 1842 the close and buildings, which were leased for a term which expired in October 1851, were conveyed in fee by S., the owner, to C. C. Sed in 1849, and in November 1851 the devisees under his will conveyed the close and buildings to the plaintiff in fee, who before 1849 was assignee of the term and occupied the buildings. In 1849 and 1850 the defendants in getting coal from their mines near but not immediately adjoining the close, caused the surface to subside, by which the buildings were injured. The devisees of C. did not thereby, in fact, sustain any damage, inasmuch as they incurred no expense, and continued to receive the full rent for the premises, and upon the sale thereof obtained the full value, without reference to any injury thereon (of which they were ignorant) by the mining operations. Subsequently to the sale to the plaintiff the working of the mines under *sedes* near to but not adjoining the close in which the buildings stood, occasioned a further subsidence. No damage was done by the working of the mines subsequently to July 1852, but the subsidence of the ground continued the consequence of the previous mining operations. The mining was skillfully conducted, and the buildings did not contribute to the subsidence. In August 1853 the plaintiff brought an action against the defendants.—*Held*, that he was entitled to recover damages in respect of the deterioration in value of the manufactory, the machinery broken, the increased expense of keeping it in repair and working order, and the diminished profits both in respect of his occupation before and after the premises.

*Held*, also, that the devisees of C. might maintain an action for the injury to their reversion during the subsistence of the lease as trustees, and for the benefit of the vendee.

THIS was a special case stated by an arbitrator for the opinion of the Court, with power to the Court to draw inferences. The pleadings in the causes formed part of the case, and were as follows:—

*Sturtan and Another v. Knowles and Others.*

**Declaration.**—That at the time in this declaration mentioned certain land, mills, buildings and workshops, steam-engines, mill-gearing and machinery, at Little Lever, were in the possession of divers persons as tenants to the plaintiffs, the reversion then belonging to the plaintiffs; yet the defendants, knowing the premises so wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support in that behalf worked certain mines under the premises and under ground near and contiguous thereto; and dug for and got and removed and carried away the mines and minerals, coal and earth there, and the



produce of the said mines there, and the support which the premises derived therefrom; that by reason thereof the foundations of the premises were greatly weakened and injured, and the ground on which the same stood respectively and the said land swagged and gave way; and the mills and machinery and dwelling-houses were rendered unfit for habitation and use and seriously and permanently shaken; and, by reason of the premises, the mills, dwelling-houses, &c., were sold for less money than they would have been had it not been for the wrongful acts of the defendants.—Second count: that the defendants being entitled to work and get the mines under the said premises, making reasonable compensation to the plaintiffs for any damage that might be occasioned to such premises by reason of such working, &c., did work the mines as in the last count mentioned, and the plaintiffs sustained such injury, &c.; and although the plaintiffs have been always ready and willing to accept compensation, &c., yet the defendants refused to make such compensation, &c.

Pleas.—First: Not guilty. Second:—That the reversion did not belong to the plaintiffs. Thirdly:—That the plaintiffs were not entitled to the support of the mines, &c., for the said premises. Fourthly:—That the cause of action did not accrue within six years before suit.

*Hamer v. Knowles and Others.*

Declaration.—That the plaintiff was possessed of certain land, mills, workshops, steam-engines, mill-gearing and machinery, and certain dwelling-houses, &c., were in the possession of divers persons as tenants to the plaintiff, the reversion then belonging to the plaintiff; that the defendants negligently and improperly worked certain mines under the premises and under ground near and contiguous thereto, and carried away mines and minerals, coals and earth, and the support which the premises derived

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SAME.



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 v.  
 SAME.

therefrom, and by reason of the premises the foundations of the premises were greatly weakened, the ground on which the same stood swagged and gave way, and the mills, &c., were shaken and gave way, and the plaintiff was unable to carry on his business as a cotton spinner and manufacturer as he would otherwise have done; and his said business was greatly hindered and stopped and the dwelling-houses, whereof the reversion belonged to the plaintiff, were shaken and the reversionary estate deteriorated in value, &c.; and by reason of the premises he suffered great injury and incurred large expenses for removing and repairing the mills, buildings, dwelling-houses, steam-engine, mill-gearing and machinery; and in attempting to keep the works, steam-engine, mill-gearing and machinery in a proper condition for work; and the depreciated value of the said steam-engine, mill-gearing, machinery, &c.; and is now liable and will have to incur large additional cost in restoring, rebuilding and repairing the same, &c.; and in the loss of profit and large expenses and loss of time suffered by the stoppage of the mill, works, steam-engine, mill-gearing and machinery, and his work-people remaining idle in consequence thereof; and in the loss of rent and use of the premises whilst so stopped and whilst undergoing repair, and by being prevented by the injury to the foundations from enlarging and extending his mill, and in loss from work done by the machinery in the mills not being so well done as it would have been but for the improper acts of the defendants, and in not obtaining an equal quantity of work from the mill as he would have done, &c. Second count: for not making reasonable compensation, &c. (as in *Stroyan v. Knowles*).

Pleas.—First: Not guilty. Secondly.—That the plaintiff was not possessed of the premises and that the reversion did not belong to him. Thirdly.—That the plaintiff was



not entitled to support. Fourthly.—That the causes of action did not accrue within six years. Fifthly.—As to the injury to the land, accord and satisfaction by making good certain damage.

On these pleas issues were joined.

The arbitrator found that:—

By indenture of lease and release, dated the 30th and 31st of December, 1828, Matthew Fletcher, the owner in fee of certain estates in Little Lever, conveyed certain closes of land, Rain Shore, Alder Field and the Green, to James Seddon in fee, save and except and always reserved to M. Fletcher, his heirs, &c., all mines, veins and beds of coal, lying and being within and under the said lands, &c., with liberty, right and privilege to and for the said M. Fletcher, his heirs, &c., from time to time and at all times, of ingress, egress and regress unto, upon and from the said hereditaments; and to do all such lawful acts, by making roads, sinking pits, erecting engines and otherwise, as shall be needful or requisite for digging, opening, working, getting or searching for all or any of the said mines, beds or veins of coal under any lands and premises in Little Lever aforesaid, or for stacking, &c.; and also to use and exercise all such other liberties and privileges in or upon the said hereditaments and premises hereinbefore released as may be necessary to full and complete enjoyment of the said mines, &c., or for carrying on the works thereof to the best advantage, he the said M. Fletcher making reasonable recompence to the said James Seddon, his appointees, heirs and assigns, for any damage that may be occasioned to the said hereditaments hereby released, by the exercise of all or any of the privileges hereinbefore reserved or any part or parts thereof.

Rain Shore and Alder Field are adjoining closes. Roads and buildings intervene between them and "The Green."

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At the time of the conveyance there were no buildings on the land.

In 1833 a loom-shed, engine-house and steam-engine were erected on "The Green." Between 1841 and 1849 these premises were enlarged and additional machinery placed in the building.

Prior to 1842 "The Green" and the buildings thereon were on lease for a term which expired on the 31st of October, 1851.

In 1842 the hereditaments conveyed to Seddon were conveyed to J. McClure in fee. McClure died in 1849, having by his will devised the premises to the plaintiffs Stroyan and Macartney in fee.

On the 1st November, 1851, Stroyan and Macartney conveyed the premises to W. Hamer in fee.

The defendants are lessees under Fletcher of the mines under the said hereditaments and of coal lying under other lands in Little Lever. In 1849 and 1850 they got coal from these mines, which caused the land on which the mill and buildings stood to subside. The foundations were damaged, and the buildings drawn towards the coal workings. The part of the close, called "The Green," unbuilt upon, it was alleged, was rendered for a time unsafe to be built upon. The mining operations which caused the damage were carried on upon land near to but not immediately adjoining the plaintiffs' property. They were carefully and skilfully conducted, and the breaking of the coal measures, so as to damage the plaintiffs' mill and buildings, was unusual. Generally the coal measures and the superincumbent soil break at a right angle with the plane of the mine.

The building and machinery did not contribute to the subsidence of the ground.

The case stated that no materials were laid before the arbitrator whereby he could form any estimate of the extent



to which the mining operations of the defendants had injured the plaintiffs' reversionary estate and interest by rendering the foundations of the buildings permanently insecure; nor whereby he could form an opinion whether the injury done, prior and up to the time of the sale and conveyance to Hamer, was or was not merely commensurate with the damages actually sustained. Assuming, in the absence of satisfactory evidence to the contrary, that the injury was commensurate only with the damage, he found that the expenditure of the sum of 62*L* 5*s*. would have repaired the damage done to the freehold, and he assessed the plaintiffs' damages contingently at that sum. The plaintiffs did not in fact sustain any damage, inasmuch as they incurred no expense and continued to receive the full rent for the premises until the sale thereof, and obtained the full value of the premises upon the sale thereof without reference to any alleged or supposed injury thereto (of which they were ignorant) by the defendants' mining operations; and the action is in fact brought by the plaintiffs as trustees for and for the benefit of the plaintiff W. Hamer. If the defendants are liable in the action *Stroyan and Another v. Knowles*, he found all the issues for the plaintiffs.

*Hamer v. Knowles and Another.*

The facts of this case, as to the title and mining operations down to the time of the sale and conveyance to Hamer, from the 1st of November, 1851, are above stated.

William Hamer before 1849 became assignee of the term, and thence continually until the termination of the leasehold interest carried on the business of a fustian manufacturer. The cottages were let to tenants by the week or fortnight.

By the subsidence of the foundations of the mill and soil the mill and cottages were damaged and deteriorated in value for the purposes of occupation; the engine and machinery broken, and the expense of keeping them in work-

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ing order increased: the quantity of goods produced was diminished and the quality of such goods deteriorated; and consequently the profits of the plaintiff's trade were lessened. The arbitrator assessed these damages contingently at 90*l*.

Subsequently to the conveyance to Hamer other coal was gotten by the defendants from mines under lands near to but not next adjoining "The Green," which occasioned further subsidence of the ground of the close and the foundations of the buildings. The mining was skilfully conducted, and the damage to the mill and buildings not foreseen. No coal was gotten subsequently to July 1852, the getting of which did any damage to the close called "The Green" or the buildings thereon, but the subsidence of the ground continued from time to time in consequence of the previous mining operations. The injury and damage in respect of the occupation of the mill, &c., after the said purchase, were of the same nature and kind as those above mentioned in respect of the occupation before the purchase. The arbitrator assessed compensation in respect of damage sustained after the commencement of the action occasioned by the mining operations before action, and also in respect of the temporary, present and future deterioration of the property. He assessed the damages contingently under this head of claim at 1500*l*. &c. The arbitrator found the issues on the fourth and fifth pleas for the plaintiff: and if the defendants are liable he found the issues on the other pleas for the plaintiff. If the defendants are liable they are to bear their own costs of the reference and pay the plaintiff's costs, &c.

*Breill* with whom were *Mout* and *Mishour* argued for the plaintiffs *a*. — The defendants are liable to make good the

(1) In Michaelmas Term, Nov. Before *Parke*, C. B. *Stroyan*, B. *Knowles*, B. and 14 and 19. Before *Parke*, C. B. *White*, B.



damage which has been caused by their workings though they are not immediately under the lands of the plaintiffs. *Primâ facie* the owner of the surface has a right of support from the subjacent strata, and if the owner of the minerals works them, it is his duty to leave sufficient support for the surface in its natural state: *Smart v. Morton* (a), *Humphries v. Brogden* (b). In *Roberts v. Haines* (c) the Court of Queen's Bench held that an Inclosure Act, which enacted that it should be lawful for the lord to come upon certain common and waste lands and search for and get coal, making compensation, did not confer on the lord any power so to work the mines as to destroy the support of the surface. That decision was affirmed in the Exchequer Chamber: *Haines v. Roberts* (d). In *Brown v. Robins* (e) the defendant had gotten the minerals from under land adjacent to that on which the plaintiff's house stood, and the house sank in consequence of the mining operations; it was found by the jury that the land would have sunk just the same whether there had been a house on it or not; and the Court held that, inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right of support for his foundations or not. It is wholly immaterial that the works did not immediately adjoin the plaintiff's premises. In *Bonomi v. Backhouse* (f) the mines were worked at 280 yards distance from the plaintiff's house. Though there were buildings on the plaintiff's land, it is found that they did not contribute to cause the subsidence.

In *Stroyan and Another v. Knowles* it is found that there was damage to the freehold which might have been repaired for 62l. 5s. Though the plaintiffs in effect sue as trustees for

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HAMER  
v.  
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(a) 5 E. &amp; B. 30. 46.

(b) 12 Q. B. 739. 751.

(c) 6 E. &amp; B. 643.

(d) 7 E. &amp; B. 625.

(e) 4 H. &amp; N. 186.

(f) E. B. &amp; E. 622.



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Hamer, they were the persons really injured. [*Wilde*, B.—The statement that the plaintiffs incurred no expense, continued to receive the full rent, and obtained the full value of the premises on the sale, is strong evidence to shew that they sustained no damage, but it is merely evidence.]

As to *Hamer v. Knowles*, the only question is, in respect of what injury is the plaintiff entitled to recover? The case of *Brown v. Robins* (a) shews that the defendants, as wrong doers in removing the support of the plaintiff's premises, are liable for *all* the consequences of their acts, and therefore they are liable to pay all the damages assessed by the arbitrator in this cause.

*Manisty* (with whom was *J. A. Russell*).—First, as to the case of *Stroyan and Another v. Knowles*, it is not shewn that there was any injury to the reversion. The premises were leased to Hamer and subsequently sold to him. There was nothing but an injury of a temporary nature, the whole of which might have been repaired for 62*L.*, and in respect of which in fact the plaintiff Hamer does recover in the other action. [*Wilde*, B.—Does not the arbitrator use the words “damage done to the freehold” as distinguished from damage done to the leasehold interest?]

As to *Hamer v. Knowles*, the arbitrator has assessed two sums, 90*L.* and 1500*L.*, in respect of the deterioration of the mill for the purposes of occupation, the repairing and maintaining it, and the diminution of the profits of the occupier. The latter is not a proper head of damage. The value of the whole mill may be less than the loss which a manufacturer might sustain by continuing to work in a damaged mill. [*Channell*, B.—You must go the length of saying that the plaintiff is not entitled to recover for the loss of profits as damages. *Wilde*, B.—Suppose the mill had begun to

(a) 4 H. & N. 186.



sink on a particular day and continued to do so for a fortnight, one machine after another being successively thrown out of gear, might not the loss of profit by the interruption of the work have been legitimately taken into consideration by the arbitrator in assessing the damage? It must not be assumed that the arbitrator has allowed for loss of profits during the whole time the mill continued to work after the subsidence.] The arbitrator has assessed the damages on a false principle. In *Bonomi v. Backhouse* (a) *Wightman*, J., said:—"With respect to the damages, I am of opinion that, as the action is founded upon the consequential damage, the plaintiffs can only recover in this action to the extent of the damage they have actually sustained, which may include not merely what they are obliged to lay out in actual repair, but the diminution in the value of the premises by reason of the damage." But when the subsidence took place, the plaintiff should not have continued to work the mill, and so aggravate the damage. Moreover the defendants are not liable for damage to buildings erected within twenty years, they having worked their mines carefully and skilfully, and taken every precaution to prevent a subsidence. No doubt, the owner of land has a right, as against the owner of a mine, to have his land supported in its natural state; but if he places buildings on the land, he does not acquire any right to have them supported unless they have been erected for twenty years. [*Wilde*, B.—*Brown v. Robins* (b) is an authority in point.] There it was not necessary to decide this question, for the buildings had been erected more than twenty years before the damage was done. The case is analogous to that of light. If a person has had a window in a particular part of his house for twenty years, he acquires a right to the light and air through it; but if he enlarges the window he loses the

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(a) E. B. &amp; E. 622. 638.

(b) 4 H. &amp; N. 186.



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right: *Renshaw v. Bean* (a). So here, when the plaintiff erected houses on the land, he lost his old right of support, and he has not yet acquired a new right. [*Wilde, B.*—In *Renshaw v. Bean* the Court said that their judgment did not proceed upon the ground that the plaintiff, by the alteration in his windows, had entirely lost the right which he before enjoyed, but that he had acquired nothing more in addition to that former right.] At all events the Court will not decide the questions upon this case, but leave the plaintiffs to their action on the award.

*Bovill* replied.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—We are of opinion that the plaintiffs are entitled to recover in both cases. The arbitrator's meaning is perfectly clear. In the first mentioned action he is dealing with a claim for damage to a reversionary interest. He describes the damage done as being a subsidence of the soil and injury to foundations. He states that he cannot find any injury beyond the damage actually done; and that, as 62*l. 5s.* would have repaired the damage to the *freehold*, he assesses the plaintiff's damages contingently at that sum. This clearly means he assesses the damage to the reversion at that amount. If there were any doubt, it would be removed by his language in reference to the second case in distinguishing between the two classes of damages he there mentions.

Then it was said he had assessed the 1500*l.* for contingent damages which might never accrue. We think this objection unfounded. All matters in difference are referred. The plaintiff says the defendant has done a wrongful act,

(a) 18 Q. B. 112.



which has been attended, and will be further attended, with damage to the plaintiff, the whole of which he claims. This is a proper subject for the arbitrator to award on. Then it was said the plaintiff ought not to have gone on working the mill and so aggravating the damages. No doubt, if he knew he would aggravate them. But if he had reasonable cause to expect the contrary, as that the ground would not further subside, he would be warranted in going on with the works. Nay, it may be that the cost of totally removing his works and leaving them unoccupied is more than equal to the total of the annual loss of continuing them. These were matters for the arbitrator to consider, and we cannot see he has determined them improperly. Then it was said the plaintiff had no right of support for buildings; but we think that if their being there did not contribute to the subsidence (as the arbitrator finds), the plaintiff is entitled to damages for injury to them through the defendant's wrongful act in causing the land to subside—the ground on which they stood. This was decided in *Brown v. Robins (a)*.

We can see no reason why the Statute of Limitations is a bar. Then it was urged that we ought not to decide the questions on this case, but leave the parties to their action on the award; but we think that the plaintiffs are entitled to our decision.

Rule that all the issues joined in the action of *Stroyan and Another v. Knowles and Others* be found for the plaintiffs; and that the issues on the 1st, 2nd and 3rd pleas (as well as the issues on the 4th and 5th pleas, already found by the arbitrator) in the action of *Hamer v. Knowles and Others* be found for the plaintiff.

(a) 4 H. & N. 186.

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Jan. 18.

OCKFORD v. FRESTON.

CHAPMAN v. FRESTON.

F. having been adjudicated bankrupt and having surrendered, the 6th of November was appointed for his last examination. At this meeting his examination was proceeded with, and the meeting was adjourned to the 3rd of December. The bankrupt was not imprisoned or in custody at the date of the adjudication. On the 1st of December he was arrested under a writ of ca. sa. issued out of this Court, founded upon a certificate granted by a Commissioner, under the 257th section of the Bankrupt Law Consolidation Act, 1849. — Held, that he was protected

**GRAY**, in this term, had obtained rules, calling on the plaintiffs to shew cause why the writs of ca. sa. issued in these causes should not be set aside, and the defendant discharged out of custody.

Ockford v. Freston.

From the affidavits on which the rule was granted, it appeared that on the 15th of September 1860 a petition for adjudication of bankruptcy was presented, in the Bristol district of the Court of Bankruptcy, against H. Freston, under which he was duly adjudicated a bankrupt on the 17th September. On the same day Freston surrendered. On the 2nd of October the first meeting under the bankruptcy was duly holden, and assignees were chosen therein. The second meeting was held on the 6th of November, when the bankrupt's examination was proceeded with, and the meeting was adjourned until the 3rd of December, and the bankrupt was allowed until that day for finishing his examination. On the 1st of December the bankrupt was arrested, by the officer of the sheriff of Middlesex, under a ca. sa. issued in this action at the suit of the plaintiff. The bankrupt was not in prison or in custody at the date of the adjudication. The writ was founded on a certificate granted by the Commissioner under

from arrest by the 112th section of that Act, and the Court therefore discharged him.

A bankrupt arrested under a writ of ca. sa., when privileged from arrest under the 112th section, is entitled to be discharged from custody, and cannot be detained under a writ of ca. sa. lodged with the sheriff after the period of protection has expired. *Dubitante Martin, B.*



the 257th section (a) of the Bankrupt Law Consolidation Act, 1849, on the 29th of November.

*Coleridge* shewed cause (Jan. 17).—The question is whether, the meeting for finishing the bankrupt's examination having been adjourned from the 6th of November to the 3rd of December, the certificate rightly issued in the interval. [*Wilde, B.*—You would admit that the certificate under the 257th section cannot be granted until after the Court had refused to grant any further protection. *Martin, B.*—What power has the Court to grant protection from arrest before the bankrupt has finished his examination, except under the 162nd section?] The 112th section enacts "That if the bankrupt be not in prison or custody at the date of the adjudication he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender, during the time by this Act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time by indorse-

(a) Which enacts, that "every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall on the application of such assignees, or of any such creditor, grant a certificate, under the seal of the Court, in the form contained in Schedule B. to this Act annexed, and every such certificate shall

have the effect of a judgment entered up in one of her Majesty's superior Courts of common law at Westminster until the allowance of the certificate of conformity of such bankrupt; and the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt; and the production of any such certificate to the proper officer of any such superior Court shall be sufficient authority to him to issue and seal such writ," &c.

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OCKFORD  
v.  
FREESTON.  
CHAPMAN  
v.  
SAME.



1861.  
 OCKFORD  
 v.  
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 CHAPMAN  
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ment upon the summons of such bankrupt think fit to appoint." It may fairly be contended that the time allowed to the bankrupt "for finishing his examination" was on the 6th of November, though there was an adjournment of the meeting. The words "as the Court shall from time to time by indorsement upon the summons of such bankrupt think fit to appoint," must be construed as overriding the whole clause, and giving to the Court a salutary power of withdrawing protection. [*Wilde, B.*—The Court should hear all that the bankrupt has to say, and not punish him first and then again examine him. *Martin, B.*—It would appear that the 112th section gives the bankrupt absolute protection when the last examination is adjourned to a day certain. The 162nd section provides that in cases where the adjournment is sine die the bankrupt shall be free from arrest for such time (if any) as the Court shall, by indorsement on the summons of the bankrupt, think fit to appoint. *Wilde, B.*—If the argument for the plaintiff were well founded the 162nd section would be unnecessary.] By the 256th section it is enacted, that if, at any sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the Court that the bankrupt committed any of the offences thereafter enumerated, the Court shall refuse to grant the bankrupt any protection from arrest. [*Channell, B.*—That is at the sitting appointed for his last examination, or at any adjournment thereof, when he does finish his examination.] In sections 160 and 162, the legislature distinguishes between the day appointed for the last examination and the adjournment days.

*Gray*, in support of the rule.—No doubt it has for a long time been the practice of the Commissioners, as soon as a bankrupt surrenders, to indorse on his summons a protection from arrest. But the protection does not arise from the



act of the Commissioner, but is given to the bankrupt by the statute. It has long since been decided that the indorsement is not necessary to entitle a bankrupt to protection : *Ex parte Leigh* (a), *Price's Case* (b). But the officer was liable to a penalty if he detained a bankrupt who produced a summons so indorsed (c). By the 112th section of the Bankrupt Law Consolidation Act, 1849, the bankrupt is protected from arrest until after the *completion* of his examination. [*Channell*, B.—The Commissioners have continued what was found to be a useful practice under the 6 Geo. 4, c. 16.] The Commissioners had no power, until after the final examination, to do an act which might subject the bankrupt to imprisonment for an indefinite time. The certificate is void and the ca. sa. ought to be set aside, because there is no judgment upon which it can be founded.

*Cur. adv. vult.*

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 OOKFORD  
 v.  
 FRESTON.  
 CHAPMAN  
 v.  
 SAME.

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*Chapman v. Freston.*

IN this case a certificate, under the 257th section, was granted on the 3rd of December, being the day to which the final examination of the bankrupt was adjourned, and a ca. sa. was issued thereon and lodged with the sheriff on the following day.

*Coleridge* shewed cause (Jan. 17).—In this case it is not denied that the certificate is regular, having been granted after the final examination of the bankrupt. The writ of ca. sa. is therefore good, and the contention of the defendant must be that because he was arrested under a void writ he cannot be detained under a valid writ. *Hooper v. Lane* (d) is distinguishable from the present case. There the sheriff

(a) 1 Glyn & J. 264.

(b) 3 Ves. & B. 23.

(c) See 5 & 6 Vict. c. 122, s. 23.

(d) 6 H. L. 443.



1861.  
 OCKFORD  
 v.  
 PRESTON.  
 CHAPMAN  
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had in his office several writs against the defendant, and arrested him on an invalid writ. [*Wilde*, B.—The writ in that case was utterly void,—it was a mere piece of paper, not sealed. Here, though the first writ might have been annulled by setting aside the certificate, it was not void. *Channell*, B.—The writ would be effective for the purpose of protecting the sheriff. *Martin*, B., referred to *Barratt v. Price* (a).] In that case the defendant had been arrested *without any warrant*, and there never was a legal custody of any sort. There, as well as in *Hooper v. Lane* (b), the party who lost his liberty was deprived of it by the wrongful act of the officer who took him. Here the sheriff, in arresting the defendant at the suit of Ockford, could not have acted otherwise than he did. If the certificate in that case was set aside the writ would follow it: but, until that time, the custody is so far legal as to justify the detainer under the second writ.

*Guy*, in support of the rule.—It is not contended that the arrest under the first writ was wrongful in such a sense as to render the sheriff liable to an action; nor is it necessary to shew that in order to bring the case within the principle established by *Hooper v. Lane* (b). It is submitted that if a person is arrested who is legally exempt from liability to arrest, as in the case of privilege, he is entitled to his discharge, if he is not guilty of laches in applying for it, though detainers have been lodged against him. The person so privileged, whether witness, party or bankrupt, has a right to have the opportunity of returning in safety to his home. The position of a bankrupt coming to attend his last examination resembles that of a man coming to a Court to discharge a public duty. [*Martin*, B., referred to *Barnard v. Norton* (c).] There are several cases in bankruptcy which shew that where a

(a) 10 Bng. 166

(b) 5 H. L. 443.

(c) 1 Q. B. 327



bankrupt is entitled to his discharge upon an arrest, he will be discharged from all detainers subsequently lodged against him: *Ex parte Hawkins* (a), *Ex parte King* (b), *Ogle's Case* (c), *Ex parte Ross* (d), *Sidgier v. Birch* (e). [*Wilde, B.*—Those are cases of contempt, and the Court asserted its privilege.] This is not the privilege of the Court, but of the bankrupt, given him by statute. It is the validity of the arrest which alone gives efficacy to the detainers. [*Wilde, B.*—Your argument is that two things are necessary to give validity to a detainer; an arrest under a valid writ, and a person capable of being arrested.] In the present case the first writ had no operation, because the bankrupt was privileged from arrest.

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 OCKFORD  
 v.  
 FRESTON.  
 CHAPMAN  
 v.  
 SAME.

*Cur. adv. vult.*

The following judgments were now pronounced.

POLLOCK, C. B.—In these cases I am of opinion that the rules must be absolute; and I may add that my brother *Channell* is of the same opinion. After the full discussion of these cases, I do not think it necessary to labour the judgment which I am about to pronounce. With regard to the first rule, I agree with the argument of *Mr. Gray*, that the bankrupt's protection does not arise from the act of the Commissioner, but from the statute, and that the Commissioner has no power to deprive him of it. The original protection was given by the 6 Geo. 4, c. 16, and that enactment has been repeated nearly verbatim in the later statute. Therefore, in the case of *Ockford v. Freston*, the bankrupt being clearly entitled to his protection, the rule must be absolute to discharge him out of custody.

(a) 4 Ves. 691.  
 (b) 7 Ves. 312.  
 (c) 11 Ves. 556.

(d) 1 Rose, 260.  
 (e) 9 Ves. 69.



1861.  
 OCKFORD  
 v.  
 FRESTON.  
 CHAPMAN  
 v.  
 SAME.

In the case of *Chapman v. Freston* the question is different. The bankrupt being in custody, a detainer is lodged against him; and the question is whether he can be legally detained, the sheriff not having been in fault in arresting him; or whether he ought to be discharged, the arrest having been a proceeding to which he was not liable. No doubt, the cases make a distinction between the sheriff being a party to a wrongful act, and where he is free from blame; but I think the decision of the House of Lords in *Hooper v. Lane (a)*, in principle, embraces this case; and, to my mind, it appears a trifling and almost ridiculous distinction to say that a man who is not liable to arrest shall be discharged if the sheriff was in fault, but shall be subject to a detainer if the sheriff was so far justified in taking him as not to be liable to an action for so doing. No doubt, the sheriff is protected if he acts in obedience to the writ: that is so whether there is a judgment or not, or whether the judgment is irregular and capable of being set aside—with that the sheriff has no concern, he is justified if he obeys the writ. But it seems to me that there is no sense in the distinction that a man not liable to arrest has a right to his discharge if the sheriff is in fault, but has no right if the sheriff is not blameable. Why should a person, who is not liable to arrest, but has been arrested under circumstances which do not render the sheriff liable to an action, be subject to a detainer any more than a person who has been arrested under circumstances which render the sheriff responsible? The illegality of the custody is the same in both cases—the man ought not to have been arrested, and is entitled to his discharge; and yet it is said that where the sheriff is in fault he cannot be detained, but where the sheriff is not blameable he may be detained. I own I cannot see the sense of that distinction. It appears to me

(a) 5 H. L. 443



better to lay down this broad principle in favour of liberty, that, where a man is illegally arrested, a detainer lodged against him during the continuance of the illegal custody shall not prevail so as to procure his detention.

Having regard to the general principles on which the common law of this country proceeds, it appears to me that my view is justified by the case of *Hooper v. Lane*. There Lord *Cranworth*, C., in delivering judgment, said :—"In *Pearson v. Yewens* in the Common Pleas, and *Collins v. Yewens* in the Queen's Bench, the defendant was discharged from custody on the express ground that he had been taken on an illegal arrest to which the sheriff had made himself a party, and so that the case of *Barratt v. Price* was applicable. And though, on the same arrest, the Court of Exchequer, in *Robinson v. Yewens*, afterwards refused to discharge the defendant in that action, that was because, on the evidence then brought forward, that Court was not satisfied that the sheriff was in any way privy to the original, to the illegal detention; and there is no doubt of the right and duty of the sheriff to arrest any one against whom he has a writ, and who can be found in his bailiwick, whether he is at large there or is illegally detained there by a stranger." Lord *Cranworth* then remarks on what fell from *Parke*, B., in the case of *Robinson v. Yewens*, and, after observing that *Maule*, B., expressly stated that the question was one of fact, whether the sheriff did or did not illegally arrest the defendant, proceeds to say: "The Court of Common Pleas, on one state of facts, came to the conclusion that he did, and applied the authority of *Barratt v. Price*. This Court, on another state of facts and more evidence, came to a contrary conclusion." Then Lord *Cranworth* expresses himself thus: "Though your lordships are not bound by the decisions of the Courts below,

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 OCKFORD  
 v.  
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yet it is manifestly inexpedient that what has been there continuously acted on as good law should afterwards be called in question in this House, unless it is made very clearly to appear that the principles on which the judgments have proceeded rest on no solid foundation. So far from that being the case in reference to the question now under consideration, I think that the doctrine propounded and acted on in *Burrott v. Price* is founded on solid good sense: and even if it be inconsistent with the earlier case in *Dyer*, referred to in the argument: *Tharland's Case* (a), I have no hesitation in advising your lordships to follow what can hardly be disputed to be the modern doctrine, acted on for the last twenty years and upwards, namely, that if a sheriff by the illegal act of himself or his officers, has taken a person unlawfully into custody," and it appears to me that when a man who is not liable to be arrested is taken into custody, that can hardly be considered a legal act,) "so that the custody amounts to a false imprisonment," and it may be a false imprisonment though no action would lie against the sheriff. "he cannot avail himself of that illegal detention to execute against the body of the prisoner other writs which he sues at the suit of other plaintiffs." It appears to me that these expressions leave it open to us to reconsider the matter argued in *Robinson v. Flaxman*: and that it is a very flimsy distinction to say that, where a man has been illegally arrested, he cannot be detained if the sheriff is liable to an action, but if the sheriff is not liable to an action he may be detained.

For these reasons, I am of opinion that these rules ought to be absolute.

MARTIN, B.—I am of opinion that the rule in *Geigley*

is a good one.



*v. Freston* ought to be absolute. This is a matter of considerable importance, because the rule which we are about to pronounce is not in accordance with what is said to be the practice of the Court of Bankruptcy, and it is right that the matter should be fully investigated before we sanction a proceeding at variance with the practice of the learned persons who administer the bankrupt law. It seems to me, however, on looking into the act of parliament, that the question is tolerably clear; and that the Commissioner had not power to grant the certificate which he granted in this case, inasmuch as the time for granting it had not arrived.

The 112th section of the Act enacts (his lordship read this section). This appears to me a clear enactment that the bankrupt shall be free from arrest for such further time as shall be allowed him for finishing his examination, and no indorsement on the summons of the bankrupt is necessary to entitle him to that right. The 113th section points out what is to be done if the bankrupt is arrested whilst protected by order of the Court; and, as my brother *Wilde* observed, it is expedient that the Commissioners should do what they have been in the habit of doing, namely, indorsing on the summons that the bankrupt is free from arrest, because it may save him the inconvenience of being arrested and applying for his discharge, and it gives the officer about to arrest notice that he must forbear. I concur in thinking that such a practice is beneficial and attended with convenience.

Now, we must see what the statute enacts with respect to the time allowed to the bankrupt for finishing his examination, and for this purpose we must refer to the 160th and three following sections. The 160th requires the bankrupt to prepare a balance sheet, and the 162nd section enacts,

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OCKFORD  
v.  
FRESTON.  
CHAPMAN  
v.  
SAME.



1861.  
 (NEW)  
 FINEST  
 CHAMBER  
 SAME

"That it shall be lawful for the Court, at the time appointed for the last examination of the bankrupt, or at any enlargement or adjournment thereof, to adjourn such examination sine die: and in such case the bankrupt shall be free from arrest or imprisonment in such time (if any) as such Court shall from time to time, by endorsement on the summons think it is proper." Reading the 112th and 113th sections together their effect appears to be, that the 112th protects the bankrupt up to the time appointed for his last examination if the adjournment thereof, and that in any examination adjourned sine die the Commissioner, if he desires that the bankrupt shall be free from arrest, must make an endorsement on the summons. The being so, we must have recourse to the 113th section for the meaning of the section. It seems to me that, upon the true construction of this section, the power of the Commissioner is not limited to the last adjournment of the last examination of the bankrupt, and that he has the power to do so until the inquiry, or he may be a continuance, is completed, and in the event of his doing that something that the bankrupt is continuing any of the business mentioned under the name of the bankrupt in the section, he cannot do so until he has made an endorsement on the summons.

The power of the Commissioner under which the bankrupt is to be examined. The true test of this section is the question of the continuance of the business. Section 112 is not a power to the Commissioner to adjourn the examination sine die, but it is a power to the Commissioner to adjourn the examination sine die, and in the event of his doing that something that the bankrupt is continuing any of the business mentioned under the name of the bankrupt in the section, he cannot do so until he has made an endorsement on the summons. The power of the Commissioner is not limited to the last adjournment of the last examination of the bankrupt, and that he has the power to do so until the inquiry, or he may be a continuance, is completed, and in the event of his doing that something that the bankrupt is continuing any of the business mentioned under the name of the bankrupt in the section, he cannot do so until he has made an endorsement on the summons.



estate shall have become records of the Court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors; and every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof." This is an express enactment that the assignees shall be judgment creditors of the bankrupt for the total amount of his debts, and that every creditor, after proof of his debt, shall be a judgment creditor to the extent of such proof. The section goes on—"And the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees, or of any such creditors, grant a certificate under the seal of the Court," &c., "and every such certificate shall have the effect of a judgment." I think, on the true construction of the 257th section, that the Commissioner has no power to grant a certificate until he has acted under the 256th section; and inasmuch as he granted a certificate before the period for his so acting arrived, he has done that which the legislature has not authorized him to do. We have no power to set aside the certificate, but we have power over the writ. I am of opinion that it ought to be set aside.

With respect to the case of *Chapman v. Freston*, if the matter had rested with myself alone, I should require time for consideration, because I am by no means satisfied that the bankrupt is entitled to his discharge. If the case depended on the authority of *Hooper v. Lane*, it would be my duty to give effect to it; but in my opinion this case is not governed by it, and we are asked to go a step further than the House of Lords. I think it is a mistake to suppose

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OXFORD  
v.  
FRESTON.  
CHAPMAN  
v.  
SAME.



1861.  
 OCKFORD  
 v.  
 FRESTON,  
 CHAPMAN  
 v.  
 SAME.

that we ought, in a case of this kind, to do otherwise than consider what is the law, and it seems to me a hardship on a man, who is no more a party to an illegal arrest than any other member of the community, that when he seeks to enforce his legal writ and take his debtor into custody, he is to be affected by the illegal conduct of persons with whom he has no concern; and because the sheriff, who is not an agent appointed by him, but an officer to whom he must deliver the writ, and over whom he has no control, has acted wrongly, he is to be deprived of the benefit of his writ. If the matter were to be considered *de novo*, I cannot help thinking that most persons would be of opinion that a man ought not to be deprived of his legal right because other persons have acted illegally. There is, however, the decision in the House of Lords upon which I am bound to act. But it seems to me that our decision in effect overrules *Robinson v. Fergus*, *1*, while *Essex v. Lee* leaves it untouched. In *Robinson v. Fergus*, *Pirie*, *B.*, *Alderman*, *B.*, and *Macle*, *B.*, distinctly say that, under circumstances like the present, the defendant was not entitled to his discharge. I own, if it had rested with me, before I discharged this defendant out of custody, I should have liked to be satisfied that the judgment of this Court in *Robinson v. Fergus* was wrong.

WILDE, *B.*—I am of opinion that both these rules should be absolute. With respect to the case of *Leigh v. Freston*, I entirely agree with the construction put upon the statute by my brother *Stanton*. It is said that the practice of the Court of Bankruptcy has adopted a construction different from that which our judgment will establish, but I am not satisfied that it is so, or so suggested. The matter was



fully explained in the course of the argument. The Commissioners have been in the habit of writing on the back of the summons a protection to the bankrupt, although in point of law that was unnecessary. In other words they have done more than was absolutely necessary, and for my part I think that, as it is attended with convenience, they may well continue to do so although we decide that it is not necessary. Then, why is it not necessary? That depends on the 112th section, which says, in distinct terms, that the bankrupt shall be free from arrest in coming to surrender, and after surrender during the time limited for surrender, and for such further time as shall be allowed him for finishing his examination. In this case the bankrupt was arrested after an adjourned meeting and before his final examination. It cannot be said that an adjourned meeting for the purpose of continuing his last examination is not part of the time allowed him for finishing his examination, and therefore the protection extends to that time. Mr. *Cole-ridge* however put the matter on the only ground on which it could be put, and argued that those words must be governed by the succeeding words, "and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time, *by indorsement upon the summons* of such bankrupt, think fit to appoint." But such a construction would violate the grammar and sense of the enactment. It is said that we ought not to be bound by the rules of grammar in cases where there is a plain intention at variance with the grammatical construction; but it is obvious that the Courts cannot dispense with the rules of grammar, for, if they did, they would have no means of construing acts of parliament. Where a section consists of several members, and at the end of it is found a general expression, the only means we have of determining whether that expression refers to the antecedent members is by

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OCKFORD  
v.  
FREESTON.  
CHAPMAN  
v.  
SAME.



1861.  
 OCKFORD  
 v.  
 FRESTON.  
 CHAPMAN  
 v.  
 SAME.

seeing what is the plain grammatical construction of the sentence. If we put upon this section the construction contended for, we should be doing great violence, not only to the grammar, but to the intention of the legislature; for a similar provision, giving protection up to time of the last examination, is to be found in the 6 Geo. 4, c. 16 (a), without any such qualification as is now attempted to be imposed. I see no reason for supposing that the legislature, when in the last Act they adopted the language of the 6 Geo. 4, c. 16, intended to attach to it anything more than the words themselves import.

That being so, the other questions become unimportant, because there is a direct legislative provision that the bankrupt shall be absolutely free from arrest up to the time of his last examination; and there is nothing at variance with that in the subsequent sections. Section 256, which gives the Commissioner power to refuse the bankrupt any further protection, speaks of "the last examination" or "any adjournment thereof;" and section 257 provides for the Commissioner granting a certificate after he has refused the bankrupt any further protection. Those sections furnish no argument against the clear meaning of the 112th section, and therefore we must give effect to it. For these reasons, I am of opinion that the bankrupt is protected from arrest.

The question in *Chapman v. Freston* turns upon whether the bankrupt, being by the statute free from arrest, can be legally kept in custody by reason of a detainer lodged against him. That must be decided by the principle unanimously adopted in *Hooper v. Lane*. The principle there laid down, whether rightly or wrongly, is this, that if a man be in illegal custody when a detainer is lodged against him, that detainer shall not operate against him; in other words, if he is once in illegal custody he must be set at liberty before

(a) Sect. 117.



he can be legally arrested. I agree that there is a difference between the writ in *Hooper v. Lane* and the writ in this case, because here the defendant could not have been discharged by habeas corpus, so far as the writ was concerned. But Mr. *Gray* put the case on a ground which I think is unassailable—that, although it may have been a legal writ, the bankrupt was by law free from arrest: that, to constitute a legal arrest, two things are necessary, viz. a good writ to arrest, and a man who is by law capable of being arrested, which was not the case here, since the bankrupt was not by law liable to be arrested. If, after his arrest, he had applied to a Judge at Chambers for a writ of habeas corpus, it seems to me that he would have been entitled to his discharge, and for this reason—because he was not by law liable to arrest. If that be so, the arrest was not under a lawful writ, and then the principle in *Hooper v. Lane* applies, and the detainer lodged against him was inoperative.

For these reasons I think that the rule in *Chapman v. Freston* should also be made absolute.

Rules absolute.

1861.  
 OCKFORD  
 v.  
 FRESTON.  
 CHAPMAN  
 v.  
 SAME.

EALES v. THE CUMBERLAND BLACK LEAD MINE COM- Jan. 24 & 26.  
 PANY (LIMITED).

**D**EBT for work and labour.

Pleas (inter alia).—First, never indebted. Secondly, that the contracts were made and the debts contracted by and by means of the fraud of the plaintiff.

The defend-  
 ants were a  
 joint stock  
 Company,  
 incorporated  
 by the regis-  
 tration of a  
 memorandum

of association under the 19 & 20 Vict. c. 47, but no articles of association were executed. Before the first general meeting the subscribers of the memorandum of association, acting as directors of the Company, appointed one of their own number manager of the mine, at a salary of 350*l.* a year.—*Held*, that, under the provisions contained in Table B., the subscribers of the memorandum of association, as directors, had power to make the appointment, and that it was not illegal either at common law or otherwise.



1861.  
 EALES  
 v.  
 CUMBERLAND  
 BLACK  
 LEAD MINE  
 COMPANY.

At the trial, before *Brownell*, B., at the Middlesex sittings in last Michaelmas Term, it appeared that the defendants were a joint stock Company incorporated under the 19 & 20 Vict. c. 47. The memorandum of association was signed by seven persons, of whom the plaintiff was one, on the 22nd of December, 1858, and was afterwards duly registered, but no articles of association were ever executed. On the 29th of March, 1859, at a meeting of the subscribers of the memorandum of association, a resolution was passed, which appeared in the minute books of the Company as follows:—

“At a meeting of the Board of Directors held this 29th day of March, 1859.

“Present: R. Eales, Esq., in the Chair.

“Messrs. D. T. Johnson, W. Watkins and Thomas Fuller.

“Resolved—That the directors visit the mine on Tuesday the 5th of April, &c. That \* \* \* this meeting be adjourned until that day, to be held upon the mine, for the purpose of making the appointment of Mr. R. Eales as manager of the mine, and for other business.

“R. Eales, Chairman.”

On the 5th of April, 1859, a further meeting of the directors was held, and a resolution passed and entered in the Company's minute book, of which the following is a copy:—

“At an adjourned meeting of directors held on the mine this 5th day of April, 1859.

“Present: D. T. Johnson, R. Eales, W. Watkins, R. Watson, J. Dixon and Thomas Fuller.

“The minutes of the last meeting were read and confirmed.

“Resolved—That R. Eales be the manager of the mine, at a salary of 350*l.* per annum.”



The plaintiff removed from Exeter to Keswick for the purpose of taking the management of the mine. At the first ordinary general meeting of the shareholders, which was held on the 28th of October, 1859, directors were appointed, and a resolution was passed that the salary of the plaintiff should be 150*l.* a year; but it did not appear that the resolution was assented to by the plaintiff.

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 v.  
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The defendants' counsel submitted, first, that the original contract was invalid, and, secondly, that the contract for salary at the rate of 150*l.* a year had been substituted for it. The jury having found a verdict for the plaintiff,

*Phinn*, in Michaelmas Term, obtained a rule nisi for a new trial, on the grounds: first, that there was no evidence of any valid or binding contract between the plaintiff and the Company created by the resolutions of the 29th of March and the 5th of April, 1859; and, secondly, that the contract, if any, created by the above resolutions was illegal and void, and was of no effect until confirmed by a general meeting of the Company.

*Collier* and *Karslake* now shewed cause.—This being a Company registered under the 19 & 20 Vict. c. 47, and no articles of association having been executed, the Company is subject to the regulations in the Schedule, Table B. The 41st section of the Act is that which governs contracts made by the Company. By clause 2, "Any contract which, if made between private persons, would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the Company in writing, signed by any person acting under the express or implied authority of the Company, and such contract may in the same manner be varied or discharged." The subscribers of the memorandum of association had authority to bind the Company. By the 44th clause of Table B,



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 EALES  
 v.  
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"the number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." And, by the 45th, "until directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of this Act, be deemed to be directors." By the 46th clause, the business of the Company is to be managed by the directors; and it appears, from clause 61, that appointments of officers may be made by directors. There is no section of the Act or clause of the regulations which makes it necessary that the appointment should be confirmed by a general meeting. [*Martin, B.*—Clause 47 provides that the office of director shall be vacated if he holds any other office or place of profit under the Company. That seems to shew that the statute contemplates a director being appointed to an office.]

*Phinn and Griffiths*, in support of the rule.—The main question is, whether directors can bind a Company by giving to each other offices at salaries to continue beyond the period of their continuance in office. The question was considered by the House of Lords in *Ernest v. Nicholls*(a). Table B., clause 22, contains directions as to the first general meeting of the Company, at which, by clause 48, the whole of the directors are to retire from office, and, by clause 51, the vacancies are to be filled up by the election of the ordinary directors to be chosen by the shareholders. The subscribers of the memorandum of association are statutory directors, not having the powers of ordinary directors. [*Wilde, B.*—By clause 45, they are to be deemed directors for all the purposes of the Act.] That clause provides that, until directors are appointed, the subscribers of the memorandum of association shall be deemed to be

(a) 6 H. L. 401.



directors. Their office is declared by the Act; they cannot take upon themselves any other; they have no power to resign, and it would be contrary to the Act for such a director to take upon himself any other office. The subscribers of the memorandum of association, as directors, are trustees for those who may become shareholders, and it is contrary to public policy that they should be allowed to pay themselves. In equity no trustee is permitted to do so. This is not a question between a stranger and the Company, but between the Company and the directors.—(They referred to *Regina v. The Commissioners for Paving &c. Cheltenham* (a).)

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MARTIN, B.—The question whether there was any evidence of a contract depends upon the 19 & 20 Vict. c. 47. It appears to us that the contract was one which, if made by a private person, might have been made by parol without writing. Then the 3rd clause of the 41st section of that Act enacts that “any contract which, if made between private persons, would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the Company by any person acting under the express or implied authority of the Company, and such contract may in the same way be varied or discharged.” And the section goes on to enact that “all contracts made according to the provisions therein contained shall be effectual in law, and shall be binding on the Company and their successors and all other parties thereto, their heirs, executors and administrators, as the case may be.” Here the directors who made the appointment were acting under the authority of the Company. It was argued that the contract was void at law. But where a contract is entered into between two parties it should be enforced, unless it is

(a) 1 Q. B. 467.



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 v.  
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 COMPANY.

clearly shewn to be illegal. No authority has been cited to shew that this contract is illegal at common law. No doubt, Companies cannot enter into contracts contrary to the 19 & 20 Vict. c. 47. The validity of their contracts depends upon that statute, but I think that the statute does not render this contract illegal. I agree with Mr. *Phinn* that it may be dangerous to allow directors to bind the Company by such a contract as this. But it is our duty to construe the Act without reference to considerations of that sort. People must take care not to become members of Companies unless they are satisfied with the directors. By clause 13, when the memorandum of association has been registered the subscribers are incorporated. The 44th clause provides that "the number of directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." By the 45th clause, "until directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of this Act, be deemed to be directors." There is no provision that the directors shall have any greater power than the subscribers to the memorandum of association. The 61st clause is a legislative declaration that the directors may appoint officers; but that, by clause 47, is subject to the provision that the office of director shall be vacated if he holds any other office of profit under the Company. That shews that it is legal to appoint a director to an office of profit. It was argued that it is unsafe to give temporary directors such a power. Still these directors, though only directors for the time being, have the power of directors for all purposes. Therefore the rule must be discharged.

CHANNELL, B.—I am also of opinion that the rule must be discharged. The question is, whether such a contract as that sought to be enforced by the plaintiff can be binding.



I see nothing to render it illegal at common law. As to the statute 19 & 20 Vict. c. 47, Table B., rules 61 and 47, so far from leading to the inference that the appointment of a director to an office to which a salary is attached is illegal, in effect shew that it is legal, subject to the consequence that the party appointed vacates his office of director. I do not feel pressed by the argument that the authority of the statutory directors is limited in point of time; the authority of all the directors is limited in that respect by the 48th clause. The power of the statutory directors appears to be the same as that of the directors to be elected by the shareholders.

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 COMPANY.

WILDE, B.—It is conceded that the persons who passed the resolution appointing the plaintiff manager of the mine were directors, and that the Company has not made any rules for itself. The 19 & 20 Vict. c. 47 allows persons associating together to form a Company to make rules by which they may circumscribe the powers of the directors. This Company not having done so, the rules in Table B. apply to it. Rule 46 is as follows: "The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not by this Act or by the articles of association, if any, declared to be exerciseable by the Company in general meeting" &c. Therefore there is a statement, which is plain and unambiguous, that the directors are to exercise all the powers of the Company except those which are to be exercised by a general meeting. Neither the statute nor any rules direct that the power here exercised is to be exercised only by a general meeting. It has been objected that it is inexpedient to permit directors to appoint one of their own number to an office of profit. I think the objection is a sound one, for the directors might enter into contracts



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 COMPANY.

injurious to the Company. But the answer is, that the shareholders might have executed articles of association restraining their powers. A former statute on this subject (7 & 8 Vict. c. 110, s. 29) provided that no contract in which a director should be interested should have any force unless confirmed by a general meeting. In the present Act the legislature has thought fit to withdraw that protection from shareholders, leaving them to take care of themselves. The 45th rule provides that, until directors are appointed, the subscribers to the memorandum of association shall for all purposes have the power of directors. If, therefore, shareholders desire to protect themselves, they must take care to limit the powers of their directors.

BRANWELL, B.—I am of the same opinion. It may be that the directors have been guilty of a breach of trust in appointing the plaintiff manager of the mine at an extravagant salary; but with that we have no concern.

Rule discharged.

Jan. 14, 15. HOLE v. THE SITTINGBOURNE AND SHEERNESS RAILWAY COMPANY.

The defendants, a railway Company, were authorized by their act of parliament to construct a railway bridge

across a navigable river. The Act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge and for opening it to admit such vessel. The defendants employed a contractor to construct the bridge in conformity with the provisions of the act of parliament, but before the works were completed the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river.—*Held*, that the defendants were liable for the damage thereby caused to the plaintiff.



and which said arm of the sea was and is a public navigable channel and passage for all the liege subjects of our lady the Queen to pass and repass with their ships and vessels at their free will and pleasure: that before the times aforesaid, and after the passing and coming into force of an act of parliament made in a session of parliament holden in the 19th and 20th years of her present Majesty, intituled &c. (19 & 20 Vict. c. lxxv.), the defendants, under and by virtue of the provisions of the Act, constructed and built a swing or opening bridge over and across the said public navigable channel or passage of the Swale, and which said bridge, at the time aforesaid, was over and across the said channel or passage, and under the management and direction and control of the defendants, and without the opening of which said bridge by the defendants, at the times aforesaid, to admit ships or vessels with their cargoes navigating the said channel and passage to pass the same bridge, any such ship or vessel with its cargo so navigating the said channel or passage of the Swale at the times aforesaid could not pass through the same or through the said bridge: that, before and at the time of the committing by the defendants of the grievances &c., a ship or vessel called the "Jason," laden with a cargo of goods and merchandize of the plaintiff under a charterparty with the owners of such ship or vessel, was being navigated with the said cargo, for the plaintiff, through and along the said channel or passage of the Swale, and the plaintiff and the master of the said ship at the time last aforesaid were respectively desirous that the said ship or vessel called the "Jason" with the plaintiff's said cargo therein should pass through the said bridge, whereof the defendants always had notice; and that all things were done and performed, and all requests made, and all notices given, and all things and events happened and occurred, and all things existed, and all times

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elapsed, to entitle the plaintiff to have the said bridge opened by the defendants, to enable the said ship or vessel &c. to pass through the said bridge, without being detained for any longer space of time than as in the said Act in that behalf mentioned: Yet the defendants, not regarding their duty in that behalf, wilfully, wrongfully and injuriously, and contrary to the said Act, neglected and refused to open the said bridge on the occasion on which the plaintiff and the master of the said ship were respectively so desirous that the said ship or vessel &c. should pass through the said bridge, for a much longer space of time than was sufficient to enable any trains or carriages, animals or passengers, ready to traverse the railway or carriage road over the said bridge, to cross the said bridge, and for opening the said bridge to admit the said ship or vessel &c. to pass the same, and for more than ten minutes on such occasion aforesaid; and thereby the defendants on the occasion aforesaid wilfully, wrongfully and unlawfully, and contrary to the said statute, detained the said ship or vessel called the "Jason," so navigating the said channel of the Swale with the said cargo therein, and hindered and prevented the said ship or vessel with the said cargo therein from passing through the said bridge for a much longer space of time than was sufficient to enable any train or carriages, animals or passengers &c. to cross the said bridge, and for opening the said bridge to admit the said ship or vessel &c. to pass the same, and for more than ten minutes on the occasion aforesaid, to wit, for the space of one week and more.—The declaration then proceeded to allege that thereby the ship, with the plaintiff's cargo therein, was necessarily hindered and delayed in navigating the public navigable channel of the Swale, and through the bridge to the plaintiff's wharf beyond the bridge: and the plaintiff was prevented from discharging the cargo at the wharf for a longer space of time than he



otherwise would have been, and thereby sustained great loss and damage; and the plaintiff, in order to prevent further loss and damage and to discharge the cargo according to the charterparty, was necessarily forced and obliged to unload the cargo into lighters to convey it to the plaintiff's wharf, and thereby the plaintiff was put to expense.—The declaration contained similar counts for the detention of two other ships of the plaintiff, called the "Admiral" and the "Alice."

Pleas (inter alia).—First, not guilty. Secondly, that the defendants did not construct or build the said bridge, nor was the same under the management, direction or control of the defendants as alleged.—Issues thereon.

At the trial, before *Cockburn*, C. J., at the last Kent Summer Assizes, the following facts appeared:—The plaintiff was a tanner, carrying on his business at Milton, near Sittingbourne, in the county of Kent. The defendants are a Company incorporated by the 19 & 20 Vict. c. lxxv. for the purpose of making a railway from Sittingbourne to Sheerness, in the county of Kent. By the 18th section of that Act (a) the defendants were empowered to construct a railway commencing in the parish of Sittingbourne and crossing the passage called the Swale, which is a public navigable channel, by an opening bridge, and terminating at Sheerness. In November, 1856, the defendants entered into a contract with one Withers for the construction of the railway and works, according to the provisions of the Act, and he accordingly erected an opening bridge across the Swale, about three miles above the Milton town wharf. The 26th section of the 19 & 20 Vict. c. lxxv. enacts "that it shall not be lawful for the Company, or any person acting under them, to detain any vessel navigating the Swale for a longer space of time than may be sufficient to

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(a) *Post*, p. 493.



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 SHERRIFFS  
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enable any trains or carriages, animals or passengers, ready to traverse the said railway or carriage road over the said bridge, to cross the said bridge, and for opening the said bridge to admit such vessel to pass through the same; and in case the Company, or any person acting under them, shall detain any such vessel for a longer space of time than ten minutes, or demand, take or receive any toll for the passage of any vessel through the said bridge, the Company or person so offending shall in every such case forfeit and pay any sum not exceeding the sum of 10*l*.; but nothing in this Act shall prevent any remedy for damages which any party may sustain in respect of any such detention as aforesaid." In February, 1860, the plaintiff chartered two vessels, called the "Jason" and "Admiral," to bring a cargo of bark from Antwerp to the Milton town wharf. On the 13th February the vessels arrived at the defendants' bridge, when it was found to be closed. On application to the engineer, he stated that the bridge could not be opened for a week or a fortnight. The bridge was in fact out of repair, and could not be lifted in consequence of one of the wheels being broken. The vessels remained there until the 16th February, when the plaintiff hired three barges, and by that means discharged the cargo within the time allowed by the charterparty. At this time Withers, the contractor, had not completed the works, and he did not deliver them up to the defendants until July, 1860.

It was submitted on behalf of the defendants, that under these circumstances they were not liable. The learned Judge reserved the point: and a verdict was found for the plaintiff, with 35*l*. 15*s*. damages.

*Excisions*, in last Michaelmas Term, obtained a rule nisi to enter the verdict for the defendants, on the ground that there was no evidence to fix them with liability.



*Lush* and *Denman* appeared to shew cause in the present Term (Jan. 14); but the Court called on

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*Hawkins* and *Hannen* to support the rule.—The contractor is liable, not the defendants. The defendants did a legal act in causing the bridge to be constructed. At common law, if the same person is owner of the soil on both sides of a navigable river, he may construct a bridge over it, if in so doing he does not interrupt the navigation. [*Pollock*, C. B.—I doubt if any person is at liberty to make a bridge over a road. It is some injury to the road to deprive it of light and air. *Martin*, B.—Probably it is a question of fact whether the erection is a nuisance to the road.] The 19 & 20 Vict. c. xxv. recites, that “the making of a railway from Sittingbourne to Sheerness, &c., with an opening bridge at or near the King’s Ferry, over the passage called the Swale, would be attended with public and local advantage.” The 18th section defines the undertaking of the Company, viz. the railway and bridge over the Swale (a). The 19th section empowers the Company to make the railway and bridge according to certain plans. Section 21 requires the bridge to be constructed according to plans approved of by the Admiralty. By section 26 the Admiralty may establish rules and regulations for opening and closing the

(a) Sect. 18.—“That the undertaking of the Company shall be the following railway and works, namely,

“A railway commencing at or near Water Lane, in the parish of Sittingbourne, and crossing the passage called the Swale by an opening bridge, and terminating at or near the Ordnance land, near Broad Street, Mile Town, Sheerness, in the parish of Minster in the Isle of Sheppy.

“A bridge over the said passage called the Swale, in the line of the said railway, at or near the ferry, called the King’s Ferry, over the said passage, with a carriage road over such bridge for the passage of carriages, animals and passengers, with convenient and proper approaches thereto, as shewn on the plans of the said railway hereinafter referred to.”



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bridge. In erecting the bridge the defendants have not exceeded the powers conferred on them by the statute and the obstruction of the navigation has been caused by the imperfect execution of the works by the contractor. [Wilde, B.—Suppose the bridge was constructed so imperfectly, that a carriage going over it fell into the water would not the defendants be liable?] Here the injury has arisen from works in the course of construction. [Pollock, C. B.—How can the Company, who have contracted with a person to build the bridge for them, transfer their liability by means of that contract to some one else?] If the obstruction had been caused by the works which the Company directed the contractor to perform, they would no doubt be liable; but as the obstruction arose from the negligent mode in which the contractor executed the works, the Company are not responsible. [Pollock, C. B.—The maxim applies: qui facit per alium, facit per se. An obligation under an act of parliament differs very little from a contract. Suppose a person, who undertook to build a prison or a county hospital, contracted with another person to construct a part of it, and he executed the work imperfectly; if the former were sued, what answer would it be to say that he had engaged another person to do the work? The defendants are in the situation of original contractors.] *Steel v. South Eastern Railway Company* (a) decided that, where work is done for a railway Company under a contract (parol or otherwise), the Company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it and direct what shall be done. [Pollock, C. B.—There is a wide difference between a liability arising from the relation of master and servant and that which exists in the present case. The defendants are authorized

(a) 16 C. B. 550.



by act of parliament to construct certain works, and they are liable if injury results from the improper execution of the works. A person authorized by act of parliament to construct works cannot transfer that authority to another person without being responsible for the proper execution of them.] No doubt, a person who employs a contractor to build a house which is a nuisance to his neighbour, does not, by entering into the contract, get rid of his responsibility, but the defendants are in a different position. They are authorized by act of parliament to build a bridge across the river Swale, provided they do not exceed the powers conferred on them by the Act. If the bridge is built in such a way as to obstruct the navigation of the river, it is a nuisance. The defendants, having lawful authority to build the bridge, employed another person to execute the work: then the question is, could that person have built the bridge without obstructing the navigation and so causing a nuisance? If he could, he is liable, not the defendants; for they employed him to do a legal act, and he has done an illegal act, the doing of which was in violation of the terms upon which he was employed. In *Overton v. Freeman* (a) the defendants contracted with parish officers to pave a certain district, and entered into a subcontract with one Warren, under which Warren was to lay down the paving of a street, the materials being supplied by the defendants and brought to the spot in their carts. Preparatory to the paving, the stones were laid by labourers employed by Warren on a pathway, and left unguarded at night. The plaintiff having fallen over the stones, it was held that Warren was responsible and not the defendants. It was argued, but without success, on behalf of the plaintiff, that the injury of which the plaintiff complained was the result of a public nuisance, and that whoever contributed in any

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(a) 11 C. B. 867.



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degree to the wrong was responsible for it. *Maule, J.*, in the course of his judgment in that case, comments upon *Mattheus v. The West London Waterworks Company* (a), where a verdict was obtained against a waterworks Company for an injury resulting to the plaintiff from the negligence of men employed by certain pipe layers, who had contracted with the Company to lay down some water pipes in a public street. He observes that it is but a *nisi prius* case; that the report is short and unsatisfactory, and the particular circumstances are not detailed. There is no distinction whether the negligence of the servants of the contractor caused injury to the person or to property. That appears from *Allen v. Hayward* (b), where a person had contracted with Commissioners for improving a navigation to perform certain works. In executing part of the work contracted for he made a drain which, from a defect in the materials, could not resist water, and without authority turned on the water, which flooded the plaintiff's land. [*Pollock, C. B.*—There the mischief was entirely collateral.] In *Reedie v. The London and North Western Railway Company* (c) it was held that the Company were not responsible for the negligence of the servant of a contractor, who allowed a stone to fall on a person passing along the highway. It is submitted that there is no distinction whether the mischief arises from negligence in dealing with real property or a chattel. [*Pollock, C. B.*—Suppose a person employs a contractor to build a house in London, and the contractor builds it so as to darken the windows of another person, is not the employer liable? *Wilde, B.*—Or suppose the contract binds the contractor not to darken the windows?—It appears to me that there is a distinction between cases where the injury results from collateral negligence and where it results

(a) 3 Campb. 408.

(b) 7 Q. B. 960.

(c) 4 Exch. 244.



from the imperfect execution of the work contracted to be done.] Suppose the bridge had fallen down before it was delivered up by the contractor, and killed a person, would the Company have been liable? In *Ellis v. The Sheffield Gas Consumers' Company* (a), that which the contractor had been employed to do was a nuisance and illegal.—They also referred to *Gayford* app., *Nicholls* resp. (b).

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POLLOCK, C. B.—I am of opinion that the rule must be discharged. The short ground on which my judgment proceeds is, that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim “Qui facit per alium facit per se” applies. Where a person is authorized by act of parliament or bound by contract to do particular work, he cannot avoid responsibility by contracting with another person to do that work. In *Ellis v. The Sheffield Gas Consumers' Company* (a) Lord Campbell said it is “a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself.” Here the contractor was employed to make a bridge, and he did make a bridge, which obstructed the navigation. The case then falls within the principle laid down in *Ellis v. The Sheffield Gas Consumers Company* (a).

Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act—the remedy is against the person who

(a) 2 E. & B. 767.

(b) 9 Exch. 702.



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did it. That, however, generally affords but a poor compensation to the party injured ; for the wrong doer is usually a common workman. Then comes the inquiry, who is the master ? The contractor. In such cases the employer is not responsible.

But when the contractor is employed to do a particular act, the doing of which produces mischief, another doctrine applies. Here the legislature empowered the Company to build the bridge : in building that bridge the contractor created an obstruction to the navigation, and for that the Company are liable. I suggested, in the course of the argument, that where a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the builder, but the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act which it is the duty of the latter to do. In such cases it is the duty of the owner of the soil to inquire what is in the course of being done—to know what is the plan—to see that the materials are good, and to take care that no mischief ensues. So here it was the duty of the Company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do—what materials he would use, and to have seen that the specification and the materials were such as would ensure the construction of a proper and efficient bridge. But I do not rest my judgment on that ground, but simply on this, that there is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed and was authorized to do.

MARTIN, B.—I am of the same opinion. I wish to confine my judgment to the facts of the case. When they



are known it is evident that the ruling of the Lord Chief Justice was correct. The plaintiff's vessels came to the entrance of a navigable river and found it obstructed. His cause of action is founded on the well known principle, that he has a right to maintain an action against the party who caused the nuisance. In order to deliver his cargo in time he was obliged to incur expense by forwarding it in barges, which, in my opinion, gave him a right to special damage against the party who created the nuisance. He finds that the defendants, a railway Company, were, by their Act, authorized to build the bridge. The bridge was imperfectly constructed, and could not be opened in consequence of some defect in the machinery. Who was it, then, who obstructed the plaintiff's vessels? On reference to the 19 & 20 Vict. c. lxxv., I find a provision that a light shall be exhibited every night on the bridge during its construction. (Sect. 24.) Now suppose the Company had contracted with a person that he should hang out a light, and the contractor had omitted to do so, is there any pretence for saying that the Company would not have been responsible? The 26th section enacts that it shall not be lawful for the Company to keep the bridge closed so as to detain any vessel navigating the Swale more than a certain time—they may stop a vessel so long and no longer. The plaintiff's vessel was detained for a longer time. By whom? By those who caused the obstruction. I do not say that the contractor is not liable; he may be liable as one of the persons who caused the obstruction; or the Company may have a right of action against him on his contract. But that is no answer to the plaintiff. The persons liable to him are those who, by themselves or their contractors, created the obstruction. Then it was said that the case resembles that of master and servant; but there is no similarity. The parties do not stand

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in the relation of master and servant. It is simply the case of a person having a right of action against the party who injured him. *Ellis v. The Sheffield Gas Consumers' Company* (a) is almost in point. In that case the defendants, in causing the streets to be broken up for their pipes, did an illegal act. Here, though it would have been a legal act to construct a proper bridge, an improper bridge was erected, which was a nuisance.

WILDE, B.—I am of the same opinion. I am glad that the case has been fully argued, because, though I entertained a strong impression that the law would turn out to be as we find it, still, when we come to formulate the principle in words, there is some little difficulty. The distinction appears to me to be that, when work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act and is responsible for it. The present defendants were authorized to take land for the purpose of their railway, and to build a bridge over the Swale. Instead of erecting the bridge themselves, they employed another person to do it. What was done was done under their authority. In the course of executing their order, the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a landowner orders a person to erect a building upon his

(a) 2 E. & B 767.



land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form.

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CHANNELL, B.—Not having heard the whole argument, I will say no more than that I see no reason for doubting the correctness of the decision.

Rule discharged.

## EX PARTE THE DEPUTY CORONER OF MIDDLESEX.

Jan. 29.

**H**UDDLESTON, on behalf of the deputy coroner of Middlesex, moved to discharge him out of custody.—It appeared that the deputy coroner was at the office of the coroner, for the purpose of procuring certain papers, which he required to enable him to proceed to hold some inquests, when he was arrested by process out of this Court. By the 6 & 7 Vict. c. 8, a coroner has power to appoint a deputy, who is in the same position, with respect to his privilege from arrest, as the coroner himself. [*Martin*, B., referred to *Callaghan v. Twiss* (a).]—He referred to *Jarvis* on the Office and Duty of Coroner, p. 63.

A deputy coroner, appointed under the 6 & 7 Vict. c. 83, is privileged from arrest while preparing to hold an inquest.

The Court ordered the officer to discharge the prisoner forthwith.

(a) 9 Irish Law Rep. 422.



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Jan. 11.

## THE LANCASHIRE WAGGON COMPANY (LIMITED)

v. FITZHUGH.

Declaration, that plaintiffs having bailed and let to P. divers waggons for a certain term, and being entitled to and the owners of the waggons subject to the interest of P., thereupon, during the said term and while the plaintiffs and P. were so interested, the defendant converted the same to his own use and sold the same, whereby the plaintiffs were injured in their title to the waggons, and the same became lost to the plaintiffs.

Pleas:—

Fourthly, that the defendant sold, but not in market overt, the waggons as sheriff in the execution of a writ of *fi. fa.*, and that at the time of the sale the defendant had not any notice of the plaintiffs' interest in the waggons.—Demurrer.

Fifthly, that the defendant seized and sold the waggons, not maliciously, and not in market overt, as sheriff, &c.; and that the plaintiffs had not sustained and will not sustain any damage.

New assignment to both pleas.—That defendant converted the waggons by absolutely selling the plaintiffs' interest and delivering the waggons to divers persons in pursuance of the sale, and thereby causing the same to be used by the said persons and worn by such user, &c.—Demurrer.

*Held*:—First, that the fourth plea was good; but secondly, that the plaintiffs were entitled to judgment on the new assignment.

**T**HE second count of the declaration stated, that the plaintiffs, having bailed and let to one George Pell divers railway waggons for a certain term, and on certain terms, and being entitled to, and the owners of the said waggons, subject to the interest in the same of the said G. Pell during the said bailment and letting, thereupon, during the said term, and while the plaintiffs and the said G. Pell were respectively so interested, the defendant broke, forced and pulled certain parts of the said waggons from the same, and thereby damaged the said waggons, and converted the same to his own use, and sold the same to some person or persons to the plaintiffs unknown, whereby the plaintiffs were greatly injured in their said title and interest to and in the said waggons, and the same have become lost to the plaintiffs, &c.

Fourth plea.—That the defendant sold, but not in market overt, the said waggons, and thereby converted the same to his own use, as and being, and not otherwise than as, sheriff of the county where the said grievances were committed, in the due execution by the defendant, as such sheriff, of a certain writ of execution of our lady the Queen to him delivered, whereby he was commanded, as such sheriff, to seize and sell the goods and chattels of the said



G. Pell in his bailiwick to satisfy certain monies due and owing from the said G. Pell to the Great Western Railway Company, and recovered by the said Company against him; and that, at the time of such sale and conversion of the said waggons, the defendant had not any notice of the plaintiffs' title to or interest in the said waggons. And that the defendant did not break, force or pull any part or parts of the said waggons, or any of them, from the same.

Fifth plea.—That the defendant seized, and took, and sold, not maliciously, and not in market overt, the said waggons, and thereby converted the same, as and being, and not otherwise than as, sheriff of the county where the said grievances were committed, in the due execution by the defendant, as such sheriff, of a certain writ of execution of our lady the Queen to him delivered, whereby he was commanded, as such sheriff, to seize and sell the goods and chattels of the said G. Pell in his bailiwick to satisfy certain monies due and owing from the said G. Pell to the Great Western Railway Company, and by them recovered against him. And that the plaintiffs had not, at the commencement of this suit sustained, and will not sustain, any damage by reason of the premises; and that the defendant did not break, force or pull any part or parts of the said waggons, or any of them, from the same.

The plaintiffs demurred to the fourth plea.

They also replied to the fourth and fifth pleas:—That they brought their action, not only for the grievances therein admitted, but for that the defendant converted the said waggons to his own use further than is in these pleas admitted, to wit, by absolutely selling the plaintiffs' interest therein, and delivering the said waggons to divers persons in pursuance of the sale, and thereby causing the same to be used by the said persons and worn by such user; and also, for that the defendant damaged the said

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waggons by causing them to be used whereby they were worn; and for that the waggons were lost to the plaintiffs by reason of the matters mentioned in the second count, and that by reason of the matters newly assigned the plaintiffs were injured in their said title and interest.

The defendants demurred to the new assignment. And the parties respectively joined in demurrer.

*Gray* argued for the plaintiffs (*a*).—The fifth plea states that the plaintiffs were not damaged; and, therefore, according to the case of *Tancred v. Allgood* (*b*), that would be an answer to the action. But the fourth plea is bad because it does not contain such an allegation: it admits that the plaintiffs have lost their goods. If a sheriff, under a writ of execution against the goods of A., seizes the goods of B. not knowing they are his, and sells them, the sheriff is liable to an action. [*Bramcell*, B.—The declaration alleges that the defendant converted and sold the goods; the plea, in effect, states that the conversion consisted in the sale.] Suppose the purchasers broke up the waggons for firewood. It is conceded that if a sheriff converts goods which are bailed to a third person, the owner has no right of action unless there is damage to his reversionary interest. But the conversion is the wrongful act, and though no cause of action arises from the conversion simpliciter without damage, yet damage may or may not occur after the conversion and delivery of the goods to the purchaser.

*Manisty* (with whom was *Milward*), for the defendant.—It is admitted that the sale took place during the term for which the waggons were bailed and let to Pell. Pell was entitled to use the waggons and deal with them as he

(*a*) In Michaelmas Term, Nov. 21. Before *Pollock*, C. B., *Bram-*  
*well*, B., *Channell*, B., and *Wilde*, B.  
(*b*) 4 H. & N. 438.



thought fit. If the purchaser only used them as Pell might have done, no action would lie against him. The plaintiffs had no right of action in trover (a); they are only entitled to sue for injury to their reversion.—The new assignment is bad; it merely repeats the complaint which is answered by the pleas. The declaration states that the defendant converted the waggon to his own use, and thereby the same have become lost to the plaintiffs. The new assignment adds nothing; it only shews how the loss took place. The substantial question then is whether the fourth plea is good. [Bramwell, B.—Suppose a sheriff sells the entire interest in a chattel of which the execution debtor is in possession for only a limited interest, is the sheriff liable to an action?] It is submitted that he is not. A sale by a sheriff, not in market overt, would not confer any title as against the owner: it is wholly nugatory. Here the sheriff had a right to seize and sell. In *Dean v. Whittaker* (b), it was held that if a party has goods on hire for a term, and the sheriff seizes them under an execution against the goods of that party, the owner of the goods may maintain an action on the case against the sheriff if the sheriff sells the entire property of such goods; but, to support the action, he must shew that as soon as the goods were seized he apprised the sheriff that the goods were lent for a term only, in order that the sheriff might know that he had only a right to sell the qualified property that the hirer had in the goods. The new assignment contains no such allegation, and the defendant, who had a right to sell, is not liable to an action merely because he professed to give a title, which in law he had no power to give: *Owen v. Legh* (c). [Pollock, C. B.—If a person lets a chattel to hire, the

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(a) See *Gordon v. Harper*, 7 T. R. 9.

(b) 1 C. & P. 347.

(c) 3 B. & Ald. 470.



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letting creates no estate, it is a mere contract. Can the hirer let to another?] If a person hires a horse, may he not lend it to a friend? [*Wilde, B.*—That depends upon the terms upon which it was let.] If a horse is let for a certain term, during that period the owner cannot maintain trespass (a) or trover in respect of an injury done to it. Assuming that the property in a chattel is in the party who hires it, he is the only person who can maintain an action in respect of it. [*Wilde, B.*—The property may be entirely in the bailor. Could a sheriff sell the interest of a pawnbroker, as pawnee? *Pollock, C. B.*, referred to *Legg v. Evans* (b).] The interest of a pawnee is a mere lien, a personal right which cannot be parted with, and *Parke, B.*, in the judgment in that case, distinguishes it from those cases where goods are let to hire for a certain period, “because there the person hiring them has the absolute use of the goods for a particular term, and that interest may be disposed of.” *Primâ facie* the defendant was bound to sell Pell’s interest. If his interest was of such a limited nature that it could not be sold, that should have been replied. If in any case a hirer may have a saleable interest, it must be assumed upon these pleadings that Pell had such an interest.

*Gray*, in reply.—Possibly the bailee might have sued for the injury to these goods, for the right of property is not essential to the maintenance of such an action. Suppose a bailee has goods in his possession without a title to them, he may maintain an action against a stranger who takes them from him. [*Pollock, C. B.*—A special or qualified property is only a special property for the purposes of litigation with particular persons, enabling the possessor to sue if

(a) See *Ward v. Macauley*, 4 T. R. 489. right of a pawnee to sell or assign his interest in the pawn, see

(b) 6 M. & W. 36. As to the Story on Bailments, ss. 324. 328.



he is deprived of such use as the contract intended to give him (a). But, as against the true owner, the only action he could maintain would be on the contract. *Wilde, B.*—It has been taken for granted that the interest of a person to whom goods have been let to hire can be sold (b). *Bramwell, B.*—If a person lets a horse to hire, cannot the hirer maintain trover if the owner takes it away? The owner may sue even if the bailee can. Suppose a bailee having a limited interest in a chattel of great value sells it as his own; and the vendee puts it to some use by which it is wholly lost to the owner, as if he builds it into a house, or takes it to America: if there was no warranty on the sale the seller might keep the entire price, while the owner, if the defendant's contention is right, would have no right of action against him, because the sale did not operate to transfer the property. In the case of *Owen v. Legh* (c) nothing more than a sale had taken place, but the decision in that case might have been different if the purchaser had cut and carried away the crops. Here the defendant put the plaintiffs' property into the hands of another under colour of sale. That was an interference with the property of the plaintiffs; and the new assignment shews an injury to the plaintiffs by acts done subsequently to the sale. Even if the fourth plea is good, the plaintiff is entitled to judgment on the new assignment.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case arose on cross-demurrers to a plea and new assignment. The action was brought against

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(a) See Stephen's Commentaries, vol. 2, p. 73. *v. Whitaker*, 1 C. & P. 347. 349.

(c) 3 B. & Ald. 470.

(b) See per *Abbott, C. J.*, *Dean*



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a sheriff for seizing goods which had been let to hire. It is probable that the question in the case cannot be satisfactorily settled till the facts are known by a trial. We shall therefore state our opinion, and the reasons for it, as briefly as possible.

We think the defendant is entitled to judgment on the fourth plea. The second count complains that the defendant broke and damaged the waggons and converted and sold the same, not expressly alleging any delivery to the vendee. The defendant, by his fourth plea, denies the breaking and damaging, which are therefore out of the question. The rest of the second count therefore is, that the defendant converted the waggons to his own use and sold them. The defendant pleads that the conversion *consisted* in the selling of them, which he did as sheriff under a fi. fa. We think, if there was no conversion except in selling, that that is no conversion in law, and no cause of action. Therefore we think the fourth plea good.

But we think the new assignment thereto good. The plaintiffs new assign that the conversion did not consist in the mere sale but in the delivery also, and in causing the purchasers to use and damage the waggons. This is not open to the objection that it is a departure from the declaration, as the word "converted" may include such matters or any others. The new assignment then shews a cause of action.

The fifth plea is not demurred to. It denies the breaking and damage, and pleads the sale as sheriff, and that the defendant *thereby* converted; and alleges that the plaintiff had not sustained and could not sustain any damage. The plaintiffs' new assignment is good to this plea, for the same reason that it is good to the other.

Judgment accordingly.



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## NYLANDER v. BARNES.

Jan. 29.

*GRAY* had obtained a rule calling on the plaintiff to shew cause why proceedings should not be stayed until security for costs had been given.

A plaintiff, captain of a foreign ship usually trading to this country, is liable to give security for costs.

From the affidavits on which the rule was obtained, it appeared that the action was brought to recover 383*l.*, balance of account, for freight, primage and demurrage of the ship "Norland." The defendants had paid into Court 335*l.* The writ issued on the 8th of December.

An order having been made by a Judge for particulars of the plaintiff's occupation, his attorney stated as follows:—"The plaintiff is a native of Norway, and is a master mariner, commanding the ship "Norland," in which vessel he trades regularly between Sundswall and England, having no permanent residence whatever."

One of the defendants deposed that the ship "Norland" had sailed from Cardiff to Alexandria, and that he believed that the ship did not trade regularly between Sundswall and England: that he believed that the plaintiff resided in Sundswall, and had no property in this country.

An affidavit on the part of the plaintiff stated that he was in England at the time of the commencement of this suit, and was in the habit of remaining here for considerable periods.

*Edward James* and *Dowdeswell* now shewed cause.—The question is whether a plaintiff, being the captain of a foreign ship, navigating habitually to the ports of this country, is liable to give security for costs. *Henschen*



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v. *Garves* (a) and *Jacobs v. Stevenson* (b) shew that a foreigner employed on board an English ship is not bound to give such security. There is no distinction between the case of a person employed on board an English ship, and the captain of a ship habitually trading to this country. In *Nelson v. Ogle* (c) the plaintiff was a foreigner, employed by different ship-owners in navigating their ships, and was never resident in any particular place longer than while his ship was detained in any port she might put into, or, in case of his discharge from one ship, until he met with another. The Court said that the plaintiff's case was not distinguishable from that of an English sailor, and refused to compel him to find security. Though the report does not state whether these ships were British or foreign, they must have been foreign ships, because at that time, by the 34 Geo. 3, c. 68, ss. 2, 5, 6, then in force, the master of a British ship must have been a British subject. In Tidd's Practice, 9th ed., p. 535., it is said, "The rule requiring such security has been relaxed by the Court of Common Pleas in favour of foreign seamen serving on board English ships, or being in the habit of navigating them to or from the ports of this country." [Martin, B.—In Archbold's Practice, by Chitty and Prentice, 19th ed. p. 1327, it is said that a foreigner serving on board a foreign vessel, constantly sailing to and from this country, will not be compelled to give security.] —They also referred to *Durell v. Matheson* (d) and *Foss v. Wagner* (e).

*Gray*, in support of the rule.—The general rule is that where a plaintiff resides abroad he must give security for

(a) 2 H. Black. 384.

(b) 1 B. & P. 96.

(c) 2 Taunt. 253.

(d) 8 Taunt. 711.

(e) 2 Dowl. P. C. 499.



costs. But not if he is only temporarily resident abroad. The plaintiff's home is not in this country; he is master of a foreign vessel which does not appear to be a regular trader belonging to one of the American lines of packets, but a vessel in which he might at any time go elsewhere, if an advantageous opportunity offered. [*Wilde, B.*—The plaintiff has now gone to Alexandria, and is certainly not in the position of a person commanding a ship which trades regularly to a port in this country.] The passage cited from *Tidd's Practice* has no reference to a foreigner navigating a foreign vessel. It is possible that the plaintiff may not return to this country for many years.

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*MARTIN, B.*—The rule must be absolute. The practice may cause hardship in some cases, but it has been established for a long period of time. If an action is brought by a foreigner against a person resident here, it is reasonable that the costs of the latter should be secured, in the event of the foreigner being unsuccessful. The practice may possibly enable dishonest debtors to prevent their creditors from suing them, in consequence of the difficulty a foreigner, having no connections here, may have in finding security. But, no doubt that evil has been long since considered. Except for the authorities cited from *Taunton's Reports*, I should have thought it clear that the present was a strong case for requiring security for costs.

*CHANNELL, B.*—I am of the same opinion. The rule, that a foreigner resident abroad, when plaintiff, should give security for costs, is intelligible, reasonable and easy of application.

*WILDE, B.*—I am of the same opinion. The case of  
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*Nelson v Ogle (a)* does not conclude this question. It does not appear to have decided that a man of all others least stationary in this country—a foreigner navigating a foreign ship—is not liable to give security for costs. When the case is examined it appears that the plaintiff, though a native of a foreign country, had no fixed place of residence, and that he was employed by different shipowners. It has been supposed that the Court were speaking of foreign ships, but there is no reference to such vessels. I can well understand the language of the Court as applying to the case of a seafaring man, in the habit of navigating English ships, under such circumstances that he could not be said to reside anywhere.

Rule absolute.

(a) 2 Taunt. 253.

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JOSLING v. IRVINE.

The defendant, on the 26th of July, sold by sample to the plaintiff 3000 gallons of naphtha, at 2s. 2d. On the 27th the plaintiff resold the same to one H., also by sample, at 2s. 6d. It appeared that the sample contained

**D**ECLARATION.—That, on 26th of July, 1860, the plaintiff bargained and agreed with the defendant to buy of him, and the defendant then agreed to sell to the plaintiff, 3000 gallons of naphtha, according to a certain sample, at 2s. 2d. a gallon, 1000 gallons to be delivered weekly, and to be paid for by the plaintiff at fourteen days, prompt, from the date of each delivery, &c.: that, though the times for the delivery of the naphtha, and every part thereof, had elapsed, and the plaintiff had performed all conditions

73 per cent. of benzol, an article used in the manufacture of Magenta dye then newly discovered, and for that purpose was worth 5s. 9d. a gallon. The defendants failed to deliver the naphtha. It was proved that H. had claimed the difference between 5s. 9d. and 2s. 6d. from the plaintiff. In assessing the damages for the non-delivery of the naphtha the jury gave this amount to the plaintiff as damages.—*Held*, that there must be a new inquiry, because it did not appear at what price the plaintiff could have procured naphtha according to the sample at the time of the breach.

On a second inquiry it appeared that naphtha known to contain 73 per cent. of benzol could not have been bought for less than 5s. 9d. at the time of the breach. The learned Judge, before whom the inquiry was executed, told the jury that the plaintiff would have no answer to an action by H. for the difference, and advised the jury to give such a sum as would enable him to pay H. The jury having given this amount:—*Held*, that the damages were rightly assessed, and that there was no misdirection.



precedent on his part, and all things had been done and happened, and the plaintiff was ready and willing to do all things which it was necessary that he should be ready and willing to do in order to have the naptha delivered, yet the defendant did not nor would deliver the naptha by weekly deliveries of 1000 gallons according to the agreement, or otherwise howsoever. And the defendant wholly neglected and refused to perform his part of the agreement, whereby the plaintiff has been hindered and prevented from performing a certain other contract made by him with one E. Hoile for the sale to him of the said naptha at greatly increased prices, &c.

Judgment having been signed for want of a plea, a writ of inquiry was executed before the Secondary of London. The evidence on his notes was, in substance, as follows:—

On the 26th of July, 1860, the plaintiff purchased 3000 gallons of naptha of the defendant, by sample. The contract was as follows:—

“ London, July, 26, 1860.

“ Bought of Mr. Irvine, 3000 gallons of naptha, at 2s. 2d. per gallon, 1000 gallons to be delivered weekly, &c.

“ Josling & Co.”

On the 27th the plaintiff entered into a contract with Hoile & Co. to sell the same for 2s. 6d. No part of the naptha was delivered. The price went up.

On cross-examination, the plaintiff said that he could not say that there was any rise in price between the 26th and the end of July, or at the beginning of August. A fortnight after the date of the contract he knew that the defendant could not carry it out.

H. Gray, the plaintiff's clerk, proved that the value of naptha depends on the quantity of benzol or benzine which it contains. Benzol is used in producing the Magenta dye. It is one of the constituent parts of ordinary naptha; but

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its quantity varies. The plaintiff could not get other naptha. The defendant offered two lots of 500 gallons each, not agreeable to sample. The sample contained 73 per cent. of benzol. Naptha containing that proportion of benzol was worth, in July last, 5s. 4d.

E. Hoile, a manufacturing chemist, proved that he agreed to purchase the 3000 gallons of the plaintiff: that naptha containing 73 per cent. of benzol was worth, in July last, from 5s. 5d. to 5s. 10d., and that he had given the plaintiff notice that he should proceed against him to recover 525*l*, i. e. 3s. 4d. a gallon on 3000 gallons, being the difference between the price he had agreed to give for the naptha and 5s. at which he estimated it.

F. Lamb, a merchant, proved that the market value of naptha containing 73 per cent. of benzol was 5s. 6d. to 5s. 9d. There was no material change between the middle of July and the middle of August. After that time it advanced 50 per cent.

Another witness stated that the quantity of benzol in the sample was 80 per cent.

The jury, under the direction of the Secondary, having assessed the damages at 537*l* 10*s*.

Gates, in this Term, obtained a rule to shew cause why the damages should not be reduced to the sum of 50*l*, or why the inquiry of damages should not be set aside and a new writ of inquiry executed, on the ground that the enhanced value which Hoile set upon the naptha should not have been received in evidence, and that the jury should not have been allowed to take it into consideration.

Pearce now shewed cause.—The first question is, whether, in estimating the damages, the liability of the plaintiff, under his contract with Hoile, may be taken into consideration. In *Randall v. Raper* (a) the defendant had

(a) E. B. & E. 84.

sold to the plaintiff seed barley warranting it to be chevalier seed barley, but delivered seed barley of an inferior kind. The plaintiff, relying on the warranty, sold the barley, with a similar warranty, to T., who sowed it and obtained an inferior crop. T. claimed compensation, which the plaintiff agreed to give him, but no sum had been paid or agreed upon. It was held that, in assessing the damages on a writ of inquiry, the jury ought to include the amount to which the plaintiff had become liable to his vendee in respect of the difference of the crops. [*Bramwell*, B.—If, when the contract was broken, the plaintiff had gone into the market and bought naphtha from another person, the defendant must have paid the difference in price which the plaintiff would have been compelled to pay. The only way in which evidence of the resale was admissible was to shew the rise in price. The question is, could other naphtha containing the same quantity of benzol have been bought. The sum to which the plaintiff is entitled is that which would have replaced him in the same position as if the contract had not been broken.]

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Gates, in support of the rule.—The plaintiff seeks to recover damages not only for the loss he has sustained, but also in respect of the profits which Hoile might have made. Such damage is too remote. The defendant had no concern with the contract between the plaintiff and Hoile; and therefore, according to the principle established by *Portman v. Middleton* (a), no damage can be recovered in respect of it. It is admitted that the plaintiff is entitled to the difference between the price at which he bought and that at which he resold on the 27th. But, after that, up to the time when the contract should have been completed, it is not alleged that there was any rise in the price of naphtha.

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[*Bramwell*, B.—The contract was broken, as to 1000 gallons, on the last day of July. The question is, at what price could the plaintiff have bought on that day naptha of a quality similar to the sample he bought of the defendant?

Martin, B.—The naptha was bought by sample; it was then resold; when analysed, it proved to be worth 6s. a gallon: then was that its value at the time of the sale?]

BRAMWELL, B.—I am of opinion that there ought to be a new inquiry. If the plaintiff could not have gone into the market and bought naptha except at a price by which he would lose 537*L* 10*s.*, he ought to recover that amount. But if, from any cause whatever, he could have bought naptha for a less sum, the damage which the plaintiff is entitled to recover is the difference between that sum and the contract price. I cannot ascertain from the notes the real facts on that point.

CHANNELL, B.—I think there should be a new inquiry in order that the facts may be fully brought before us. It does not distinctly appear what the price of naptha was before the middle of August. There was a breach by the non-delivery at the end of the first week, and if, within a reasonable time for the plaintiff to buy naptha elsewhere, the price had risen, the plaintiff would be entitled to the difference as to that parcel; and, assuming that the price had then risen to 5*s.* 9*d.*, the damages are right. If the price had only risen at the expiration of the second or third week, the plaintiff would merely be entitled to the difference in price as to those parcels.

WILDE, B.—I am of the same opinion. It is clear that, when a contract of this description is broken, the purchaser is entitled to the difference between the contract price and

the market price at or about the time when the contract ought to have been performed. Here the delivery ought to have taken place on three several days, the 1st, 8th and 15th of August. The way to arrive at the proper measure of damage is to inquire the market price at the first, second and third of these periods. It is immaterial whether the rise in price is occasioned by scarcity, or increased demand, or any other cause. I also think that the contract with Hoile is immaterial, and has no bearing on the question. If I could see that there was the slightest trace of an inquiry having taken place as to the market price on those days, I should not disturb the verdict.

MARTIN, B.—I also think that there ought to be a new inquiry. The facts, as I understand them, are that the plaintiff, on the 26th July, purchased of the defendant, by sample, 3000 gallons of naptha, at 2s. 2d. a gallon, which the plaintiff sold on the 27th, also by sample, to Hoile & Co., for 2s. 6d. There was therefore an increase on the market price. When the naptha was analysed it was found to contain 73 per cent. of benzol. The plaintiff said to the defendant, "If you had delivered the naptha, it would have been found to contain that amount of benzol, and therefore would have been worth 5s. 6d." The real transaction was, that the defendant sold an article which was of greater value than any of the parties were aware of at the time of the sale. The plaintiff could not complete his contract with Hoile & Co. except by purchasing naptha at this enhanced price, and that is an expense which he incurred by the defendant's default. Upon these facts, I think that the case of *Randall v. Raper* (a) is decisive to shew that the damage which the plaintiff is liable to pay to the subpurchaser may be taken into consideration. I agree that, if a person purchases stock, or any other article, which

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has a certain known price and quality, the market price at the time of the breach affords a fair measure of damage. But, in this case the value of the naptha may have risen immediately after the sale, and there may have been no ascertainable market value.

The rule will be absolute, and it may be a part of such rule that the writ of inquiry be executed before a Judge at Nisi prius, the defendant to take short notice of trial for the sittings after Term.

Rule accordingly.

The writ of inquiry was then executed before *Martin, B.*, at the London Sittings after Hilary Term, when, in addition to the evidence given on the former occasion, it was proved that, in July 1860, the market price of naptha known to contain 73 per cent. of benzol was 5*s.* 9*d.* Hoile & Co. had become bankrupt. The learned Judge told the jury that the plaintiff would have no answer to an action by the assignees of Hoile & Co. for the difference between 2*s.* 6*d.*, the contract price, and the value 5*s.* 9*d.*, and his lordship advised the jury to give to the plaintiff such a sum as would enable him to pay Hoile's assignees.

Gates, in Easter Term (April 17), moved to set aside the assessment of damages, and for a new inquiry on the ground of misdirection.

BRAMWELL, B.—I am of opinion that there should be no rule. There is no real difference between my opinion and that of my brother *Erle*, as expressed in the case of *Randall v. Raper* (a). When a person has bought an article, and the seller does not deliver it, if the buyer can go into the market and get it elsewhere, the difference between the

(a) E. B. & E. 84.

two prices, if any, is the measure of damage. The buyer need not go into the market the next day, but is entitled to the difference in price at the time when he might reasonably procure the article. Here it was proved that the plaintiff could not have bought naphtha of the same quality as that contracted to be sold except at an increase of price equal to the damages claimed. If one man has the sagacity to discover the value of an article which another possesses, and buys it, he is entitled to the benefit of his bargain. To hold that the buyer is bound to tell the seller the value would be to establish a rule for the benefit of the idle and ignorant. *Randall v. Raper (a)* is distinguishable from the present case. There the seller, by delivering barley not according to contract, the defect in which could not be discovered till the barley was delivered, deprived the buyer of the opportunity of going into the market and getting other barley. In the present case I concurred in granting the rule on the former occasion, because, though there was evidence that naphtha containing 73 per cent. of benzol was worth 5s. 9d., it was consistent with that that such naphtha might have been bought at 2s. 6d., because people in general did not know that there was benzol in it. Upon the Secondary's notes, it was not clear whether or not there was any evidence of the market price of such naphtha.

WILDE, B.—I am satisfied that the proper question was left to the jury. I agree with my brother *Bramwell* as to the distinction between this case and *Randall v. Raper (a)*.

MARTIN, B.—I think that, when the amount of the loss which will be sustained by a plaintiff can be fixed with certainty, a Judge should endeavour to persuade the jury to adopt it as the measure of damages.

Rule refused.

(a) E. B. & E. 84.

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THE SOUTH EASTERN RAILWAY COMPANY v. WARTON.

Declaration on a bond, conditioned for the due performance by the defendant of a contract to execute certain railway works according to a specification. Breach: that the defendant did not complete three tunnels according to the specification.

Plea (by way of estoppel): that, before the suit, by another deed, it was declared that, with certain exceptions therein mentioned not relating to the causes of action, the defendant and the plaintiffs had adjusted and mutually satisfied every other claim or demand which the said parties then had against each other, as the plaintiffs and the defendant did by the said deed severally admit.

Replication: setting out the deed which, after reciting the contract to execute the railway works, and a provision therein for the reference to arbitration in case the defendant should be hindered in the execution of the works by the plaintiffs or their engineers; and that the plaintiffs had made out an account containing a variety of matters in respect of which they claimed compensation, a copy whereof was contained in a schedule to the deed, further recited: *that, with the exception of the claims contained in the schedule, S. E. R. Company (the plaintiffs) and C. W. (the defendant) had settled, adjusted and mutually satisfied every other account, claim or demand which the parties had against each other arising out of the said contract, as the said S. E. R. Company and C. W. did thereby severally admit and acknowledge; but the claims of the said C. W., set forth in the schedule, were disputed*; and that it had been agreed that the claims of C. W. in the schedule should be referred to the award of G. W.: *Witnessed*: that the parties covenanted to abide by the award of G. W.; that the submission should not be defeated by the death of the parties, and that the costs should be in the discretion of the arbitrators, &c.—*Held*, that there was no estoppel; that by the true meaning of the deed the arbitrators were confined to the matters mentioned in the schedule, and that the admission was made for the purpose of the reference only.

DECLARATION.—That the defendant by his bond, sealed with his seal, bearing date the 9th of April, A.D. 1847, acknowledged himself to be bound to the plaintiffs in 20,000*l.* subject to a condition whereby, after reciting that by indenture dated the 9th of April, A.D. 1847, made between the defendant and H. Warden of the one part and the plaintiffs of the other part, for the considerations therein expressed, the defendant and H. Warden covenanted with the plaintiffs that they would make, execute and complete certain railway works authorized by "An Act to authorize the South Eastern Railway Company to make a railway from Tunbridge Wells to join the Rye and Ashford extension of the Brighton, Lewes and Hastings Railway, near Hastings," together with the ballasting, and all requisite excavations, embankments, cuttings, tunnels, &c., brickwork, masonry, &c., described in the said indenture, and the specifications, &c., thereto annexed &c., in the manner particularly mentioned in the said indenture or the specification thereunto

annexed,—the condition of the bond was declared to be that if H. Warden and the defendant did make, execute and complete the railway and works according to the indenture and specification, then the bond should be void; otherwise the same should remain in full force.—Breach: that the defendant and the said H. Warden did not make or complete the railway and other works according to the stipulations in the indenture and specifications in that they did not execute and complete three tunnels according to the specification, whereby the bond became forfeited.

Plea.—That the plaintiffs ought not to be permitted to say that there are any such causes of action as in the declaration alleged, or to sue for the same, because after the accruing thereof, and before the commencement of this suit, by another deed, dated the 7th of April, 1854, made between the plaintiffs of the one part, and the defendant and H. Warden of the other part, and sealed with the common seal of the plaintiffs and with the seals of the defendant and H. Warden, it is declared that, with certain exceptions in the said deed mentioned, and which exceptions never did, and do not in any way, touch, affect or relate to the said causes of action, or any part thereof, the defendant and H. Warden and the plaintiffs had settled, adjusted and mutually satisfied every other claim or demand which the said parties then had against each other, arising in any account, matter or thing whatsoever, as they the plaintiffs and the defendant and the said H. Warden did by the said deed severally admit and acknowledge, and this the defendant is ready to verify: wherefore he prays judgment if the plaintiffs ought to be admitted, against their own deed, to say that there is any such existing cause of action as alleged.

Replication (setting out the deed, and a schedule annexed to it, in words and figures, the material parts of which were in substance as follows):—The indenture, which was between the South Eastern Railway Company of the one

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part, and the defendant and Henry Warden, called "the contractors," of the other, recited that the South Eastern Railway Company were authorized to make the railway, and had caused a specification to be prepared for a double line of railway from the Grove Tunnel to the turnpike road from Robert's Bridge to Brighting; and that, by the indenture of April 1847, "the contractors" covenanted that they would well and sufficiently, and with the best materials, make, execute and complete the said double line of railway being a distance of fifteen miles, together with the ballasting, with all requisite excavations, &c., tunnels, brickwork, masonry, &c., described, &c., and deliver over the same when completed within twelve months from the time when possession was given to "the contractors" of the said land: that "the contractors" should provide all stores, bricks, &c., described or referred to in the specification, &c.: that "the contractors" should fulfil all the requisitions, conditions, &c., contained in the said specification or drawings, or that might be reasonably inferred therefrom: that if "the contractors" should be hindered in the execution of any of the works in consequence of any acts or omissions of the South Eastern Railway Company or their engineers, such hindrance should not vacate or otherwise affect the agreement, except that the question whether what (if any) compensation should be made should be settled by arbitration. That in consideration of the premises the South Eastern Railway Company agreed to pay to "the contractors" 202,000*l.* at the times and in manner subject to the proviso thereafter mentioned: that no breach except non-payment should annul the contract, or discharge "the contractors" from the observance of the covenants on their part, but compensation for damage (if any) from such breach or non-observance, should be paid to "the contractors" on account of any delay: that "the contractors" commenced the works in April 1847, but did not

complete them till September 1851. The indenture then proceeded:—"And whereas C. Warton (the defendant) and H. Warden have made out and delivered to the South Eastern Railway Company an account in writing, signed by them respectively and marked with the letter 'A.', including a variety of matters, in respect whereof they claim to be paid compensation by the South Eastern Railway Company, and the particulars of which account amount to the sum of 28,280*l.*, in discharge whereof they have offered to take 20,000*l.*, and a copy of which account is contained in a schedule hereunder written. And whereas, with the exception of the claims of the said C. Warton and H. Warden contained in the said schedule, the said C. Warton and H. Warden and the South Eastern Railway Company have settled, adjusted and mutually satisfied every other account, claim or demand which the said parties have or hath against each other, arising out of the said contract, or any other account, matter or thing whatsoever, as they the said South Eastern Railway Company and the said C. Warton and H. Warden do hereby severally admit and acknowledge; but the claims of the said C. Warton and H. Warden, contained and set forth in the schedule, as well as the amount claimed thereby, are disputed by the South Eastern Railway Company. And whereas it has been agreed between the South Eastern Railway Company and the said C. Warton and H. Warden, that the claims of the said C. Warton and H. Warden against the South Eastern Railway Company in the said schedule should be referred to the award, arbitrament, &c., of G. W., J. R. and T. B." "Now these presents witness: That in pursuance of the said agreement the South Eastern Railway Company covenant, promise and agree with C. Warton and H. Warden, &c., and the said C. Warton and H. Warden covenant with the South Eastern Railway Company, to abide by the award of

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the arbitrators," &c. : that the submission shall not be defeated by the death of C. Warton and H. Warden : that the parties shall attend to be examined if required : that they produce books and permit inspection : that they will not delay the arbitration : that if the parties shall not attend upon the arbitrators after ten days' notice the arbitrators may proceed *ex parte* : that the parties shall be examined on oath : that the costs shall be in the discretion of the arbitrators : that the arbitrators shall have all the powers of a Court of equity and Court of law : that the submission may be made a rule of the Court of Queen's Bench ; and that, in the event of any valid objection to the award, that Court shall have power to refer it back, &c.

The schedule, which was also set out, contained claims for compensation, delay in giving possession of the land to the contractors, in substance as follows :—

Unemployed plant, &c. : Salaries to agents, &c.

Total of claims	-	-	-	-	£2800
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Company's engineers : Delaying the works in various ways till October 1848. Total of

claims	-	-	-	-	£7400
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Delay in obtaining land and materials between October 1848 and October 1849. Total

of claims	-	-	-	-	£2100
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From October 1849 to October 1850 : Delay by non-delivery of permanent materials and

non-possession of land	-	-	-	-	£2200
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October 1850 to September 1851 : Delay by non-delivery of permanent materials and giving

up clay cuttings, &c.	-	-	-	-	£2400
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Retention of 10,000*l.* guarantee fund, loss of interest, &c.

	-	-	-	-	£1750
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Maintenance of road for longer period than con-

templated by contract, &c.	-	-	-	-	£2500
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Demurrer and joinder.

Knowles (with whom was *Deedes*), in support of the demurrer.—The plea is good, and the replication affords no answer to it. The only objection which can be suggested to the plea is, that the declaration is not on the deed which contains the estoppel. In *Bowman v. Taylor* (a) the principle of estoppels is said to be, “that where a man has entered into a solemn engagement by deed, under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted.” According to that doctrine there is an estoppel in the present case. [*Martin*, B.—Was it meant that this dispute as to the tunnels should be included in the reference?] The words of the acknowledgment are sufficiently large to include the dispute as to the tunnels, and therefore evidence is not admissible to shew that the intention of the parties was different from that which they have expressed: *Lainson v. Tremere* (b). *Carpenter v. Buller* (c) will probably be relied upon by the other side. In that case it was held that when a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is not, *as between the parties to that instrument and in an action upon it*, competent to the party bound to deny the recital; but a party to an instrument is not estopped in an action by another party not founded on the deed, and wholly collateral to it, to dispute the facts so admitted. It should however be observed that in *Carpenter v. Buller* the estoppel was not pleaded. The deed of 1847 provides for reference of matters in dispute. The deed of 1854 cannot be said to be wholly collateral, for it carries out the arrangements. In this respect the case resembles *Wiles v. Woodward* (d). The object of the parties was to put

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(a) 2 A. & E. 278. 291.

(b) 1 A. & E. 792.

(c) 8 M. & W. 209.

(d) 5 Exch. 557.

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an end to all differences. [*Channell*, B.—If the deed of 1854 had been a release the matter would have been clear. *Martin*, B.—It seems to me an estoppel only for the purposes of the arbitration. Did the parties mean more than that?] The acknowledgment may be good as an estoppel in pais, being a matter by which the situation of the parties was altered.—They also referred to *Freeman v. Cooke* (a) and *Rowntree v. Jacob* (b).

Lush (with whom was *Welsby*) appeared for the plaintiffs, but was not called upon to argue.

MARTIN, B.—We are of opinion that there must be judgment for the plaintiffs. The action is on a bond conditioned for the performance of covenants by the defendant and H. Warden in a deed dated in 1847; and the breach is, that the defendant and H. Warden broke a covenant to execute certain works contained in the deed. There is a plea, by way of estoppel, which is in confession and avoidance. The plaintiffs reply setting out the indenture, and to this replication there is a demurrer. It then appears that in 1854 the parties, by an instrument under seal, stated that, with the exception of certain claims contained in the schedule, the plaintiffs and the defendant and H. Warden had settled, adjusted and mutually satisfied every other account, claim or demand arising out of the contract on which the action is brought. Mr. *Knowles* contended that, the language being general, the effect which the Court must give to it does not depend upon the intention of the parties. I cannot concur with him. Every deed must be construed according to that which, looking at the document itself, appears to be the intention of the parties. It is true that in construing a deed the Court cannot look at collateral matters, but the

(a) 2 Exch. 654.

(b) 2 Taunt. 141.

intention of the deed as appearing upon the face of it must be regarded. If, in the present case, it had appeared that the parties intended to abandon every claim except those referred to in the schedule, the argument on the part of the defendant would have been unanswerable. But when the whole deed is looked at no such intention appears. The parties intended to refer certain matters to arbitration. They introduce the recital that, "whereas, with the exception of the claims of the said Charles Warton and Henry Warden contained in the schedule, the said Charles Warton and Henry Warden and the South Eastern Railway Company have settled, adjusted and mutually satisfied every other account, claim or demand which the said parties have or hath against each other arising out of the said contract, or any other account, matter or thing whatsoever, as they the said South Eastern Railway Company and the said Charles Warton and Henry Warden do hereby severally admit and acknowledge; but the claims of the said Charles Warton and Henry Warden, contained and set forth in the said schedule, as well as the amount claimed thereby, are disputed;" and the recital goes on to state that it had been agreed that the claims contained in the schedule should be referred to an arbitrator. The true meaning of the deed is, that the *arbitration* shall be confined to the matters specified in the schedule, and the admission is made for the purpose of that deed. I do not think that the parties ever contemplated that whatever cause of action either might have against the other should finally cease. A recital in such a deed would be binding if it was the bargain on the faith of which the parties acted. But that is not the case here. Neither is this an estoppel by means of a recital contained in the deed which is the foundation of the action. In *Carpenter v. Buller* (a), it was held that a party to an instru-

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(a) 8 M. & W. 209.

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ment is not estopped in an action by another party not founded on the deed and wholly collateral to it; but evidence of the circumstances under which such admission was made is receivable to shew that the admission was inconsiderately made, and not entitled to weight as proof of the fact it is used to establish. That appears to me to be conclusive. The arbitration was a wholly collateral matter. The admission, is evidence, and may be strong or of very little value according to circumstances. Here, I collect from the deed that it was not the intention of the parties to prevent the plaintiffs from bringing such an action as the present.

CHANNELL, B.—I am of opinion that the plaintiffs are entitled to judgment. This is said to be an estoppel arising out of matter contained in a recital. But what is the true construction to be placed on the recital? The deed appears to have been prepared for the purpose of referring certain disputes to arbitration; and the intention of the recital is to limit the arbitrators to the matters contained in the schedule. If we could see the parties had agreed to release all other claims in consideration of the agreement to refer, then there might be an estoppel; but that does not appear to have been their meaning. On these grounds the plaintiffs are entitled to judgment. It was said that this is not a question of intention. It may be that, when a deed contains a recital of a particular fact in express terms, the effect of the recital cannot be got rid of by shewing what the intention of the parties was. But when the language is general, we may collect the intention from the terms of the whole deed, and in that way we have endeavoured to arrive at the true construction of the deed in the present case.

Judgment for the plaintiffs.

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POTT and Another, Assignees of WILLIAM DEAN and
JAMES DEAN, Bankrupts, v. LOMAS. Jan. 11.

DEBT by plaintiffs, as assignees of W. Dean and J. Dean, bankrupts, for money payable to the bankrupts, for work done and materials provided for the defendant &c.

Pleas (inter alia). First, payment. Secondly, set-off. Thirdly, as to 23*l.* 7*s.* 5*d.*, for a plea upon equitable grounds, that W. Dean and J. Dean, before either of them became bankrupt, for valuable consideration in that behalf, did, upon the requisition of John Butterworth, and pursuant to an agreement in that behalf made by and between W. Dean and J. Dean and J. Butterworth, by a certain writing directed and delivered to the defendant, equitably assign and appropriate to the payment of 23*l.* 7*s.* 5*d.*, then due by W. Dean and J. Dean to J. Butterworth, an equal sum of money out of the amount due or to become due to W. Dean and J. Dean for work done and materials provided by them for the defendant; and the defendant then had notice of and assented to the said writing; and the defendant, before the suit, satisfied and discharged the claim of J. Butterworth in respect of the said 23*l.* 7*s.* 5*d.* by payment of an equal sum to him out of money due for the work done and materials provided and appropriated thereto as aforesaid; and the several acts, matters and things mentioned in this plea were respectively done really and bona fide and not by way of fraudulent preference; and the plaintiffs never had any equitable right, title or interest in or to the said 23*l.* 7*s.* 5*d.*

In an action by the assignees of D. a bankrupt against L., it appeared that D., before his bankruptcy, being indebted to B., at the request of the agent of B., verbally promised to give B. an order on the defendant who was indebted to him. D. then gave to B. an order (unstamped) as follows:—
"D. to B. Debtor. To balance of account 23*l.* Mr. L. Please to pay the above account and charge it to our account as paid. 20th Oct. 1857." The defendant then gave the following document to B.:—
"Mr. B. I agree to pay you cash as per order of D." D. subsequently became bankrupt, and the defendant, after the bankruptcy, paid the 23*l.* to B.—

Held, that, the order being inadmissible for want of a stamp, there was no evidence of an equitable assignment of the debt, so as to entitle the defendant to credit for the payment made by him after the bankruptcy.

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Fourthly, as to the same 23*l.* 7*s.* 5*d.*, for a defence upon equitable grounds.—That W. Dean and J. Dean, for certain valuable consideration in that behalf, did, upon the requisition of J. Butterworth, and pursuant to an agreement made by and between the said W. Dean and J. Dean and J. Butterworth, by a certain writing directed and delivered to the defendant, equitably assign and appropriate to the payment of 23*l.* 7*s.* 5*d.*, then due by W. Dean and J. Dean to J. Butterworth, an equal sum of money out of the amount due or to become due to W. Dean and J. Dean for work done and materials provided for the defendant; and the defendant then had notice of and assented to the appropriation; that the several acts, matters and things in the plea aforesaid were really and bonâ fide made, done and entered into before the filing of the petition for the adjudication of bankruptcy against W. Dean and J. Dean in which they were adjudged bankrupts, or any other such petition against them or either of them, and without notice by J. Butterworth or by the defendant of any act of bankruptcy committed by W. Dean and J. Dean or either of them; that the defendant, before this suit, satisfied and discharged the claim of J. Butterworth in respect of the said 23*l.* 7*s.* 5*d.*, which then remained due as aforesaid, by payment of 23*l.* 7*s.* 5*d.* to him out of moneys due for work done and materials provided, and appropriated thereto as aforesaid; and none of the several acts, matters and things in the plea aforesaid were made or done by way of fraudulent preference; and the plaintiffs never had any equitable right, title or interest in or to the said 23*l.* 7*s.* 5*d.*

The plaintiffs took issue on all the pleas, and replied to the third and fourth pleas:—That the defendant had not notice nor did he assent to the said equitable assignments or appropriations in the said third and fourth pleas mentioned, nor did he pay the said sum of 23*l.* 7*s.* 5*d.* in those pleas

mentioned at any time before W. Dean and J. Dean became bankrupt, or before the filing of the petitions for the adjudication of their bankruptcy, or before the defendant and J. Butterworth had notice of acts of bankruptcy by the bankrupts committed: and the said moneys in the said third and fourth pleas respectively mentioned, with and out of which the said sums of 23*l.* 7*s.* 5*d.* were paid as in those pleas alleged, after the making of the said equitable assignments and appropriations, remained and continued to be, and were, debts by the consent and permission of J. Butterworth in the order and disposition of W. Dean and J. Dean, as the reputed owners thereof, until they became bankrupts, and until the defendant and J. Butterworth had notice of acts of bankruptcy by them the said bankrupts committed, and until the filing of the petition; and the moneys with and out of which the said sums were so paid were debts and chattels which W. Dean and J. Dean, at the time they became bankrupts, and when the defendant and J. Butterworth had notice of acts of bankruptcy by them committed, and at the time of filing the said petition, had, by the consent and permission of the true owner thereof, to wit the said J. Butterworth, in their, the said bankrupts', order and disposition, and whereof they, the said W. Dean and J. Dean, by the like permission and consent, then were the reputed owners; and that the Court of Bankruptcy, whereby the said W. Dean and J. Dean were adjudged bankrupts, ordered the same to be disposed for the benefit of the creditors under the said bankruptcy.

Issue thereon.

At the trial, before *Martin*, B., at the last Liverpool Summer Assizes, it appeared that the action was brought by the plaintiffs, as the assignees of W. Dean and J. Dean, who became bankrupts in December, 1857, to recover a balance of moneys alleged to be due for work done by the

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bankrupts, before their bankruptcy, in building a cotton mill for the defendant at Burnley.

The question was, whether the defendant was entitled to credit for a sum of 23*l.* 7*s.* 5*d.* paid by him to John Butterworth in November, 1859. In order to establish his case upon that point, the defendant proposed to put in an unstamped document which was given to him by the bankrupts, as follows:—

“ Burnley, October 20th, 1857.

“ Mr. James Dean to John Butterworth, debtor.

“ 1857, Jan. 1. To balance of account rendered, 23*l.* 7*s.* 5*d.*

“ Mr. William Lomas. Sir, Please to pay the above account, namely 23*l.* 7*s.* 5*d.*, to John Butterworth, corn miller, Burnley, and charge the same to our account as paid to us in full. As witness my hand, this 20th day of October, 1857.

“ William and Jas. Dean.”

“ Witness, Thomas Butterworth.”

It was objected that this document was a bill of exchange, and as such was inadmissible for want of a stamp; and it was rejected. It was then proved that the defendant gave the following document to Butterworth:—

“ Mr. Butterworth. Dear Sir, I agree to pay you cash 23*l.* 7*s.* 5*d.*, as per order of William and Jas. Dean, if I have so much cash in hand on completion of their contract, of which I think there is no doubt.

“ I am,

“ Yours truly,

“ October 20th.”

“ William Lomas.”

The following additional evidence was then given. John Butterworth stated that 23*l.* 7*s.* 5*d.* was due to him from the bankrupts in 1857. Thomas Butterworth stated that he called on the bankrupt William Dean with reference to the

debt of 23*l.* 7*s.* 5*d.* due to his uncle John Butterworth, and asked him if he would give an order on the defendant for the amount. The bankrupt W. Dean agreed to do so, and Thomas Butterworth then went away.

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The learned Judge thought that there was evidence of an equitable assignment of the debt, independently of the order of the 20th of October; and a verdict was accordingly entered for the defendant, leave being reserved to the plaintiffs to move to enter a verdict for such amount as the Court should think fit.

Rew, in Michaelmas Term (Nov. 7), obtained a rule to enter a verdict for the plaintiffs for 23*l.* 7*s.* 5*d.*, on the ground that there was no evidence of an equitable assignment to John Butterworth, or of the defendant's right to credit, as against the plaintiffs, for the payment made to Butterworth after the bankruptcy.

Temple and *Mellish* shewed cause (*a*).—There was evidence of an equitable assignment of the debt, independently of the bankrupt's letter of the 20th of October. Thomas Butterworth called on the bankrupt, W. Dean, for payment, and asked him for an order on the defendant. W. Dean agreed to give it, and the money was subsequently paid by the defendant to Butterworth, in consequence of something that was said or done by the bankrupts in pursuance of that agreement. No order in writing was necessary. If Butterworth had requested Dean to ask the defendant to pay him, and Dean had verbally assented, that would have been a sufficient equitable assignment of the debt. [*Martin*, B.—The question comes to this, would the defendant have had a case if there had been no order?] The agreement between W. Dean and Butterworth, that Butterworth should

(*a*) In Michaelmas Term. Before *Pollock*, C. B., *Martin*, B., *Channell*, B., and *Wilde*, B.

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be paid by the defendant, amounted to an authority, coupled with an interest, which could not have been revoked by the bankrupts. The assent of the defendant was only necessary in order to render him liable to an action by Butterworth. The moment the bankrupt agreed to give an order on the defendant and the defendant had notice of it, the assets in the defendant's hands were bound. The existence of the unstamped written authority does not prevent the defendant from giving evidence of these facts: *Singleton v. Barrett* (a). [Pollock, C. B.—If Butterworth had brought an action against the defendant, must he have paid the money?] That involves the same question. The defendant's answer of the 20th of October was receivable in evidence, because it was part of the *res gestæ*. It was in fact a declaration of the trust of the fund.

Monk and Rew, in support of the rule.—To perfect the assignment it was necessary that there should be an order, written or oral, by the bankrupts to the defendant to pay the money to Butterworth; a mere promise to give an order is not sufficient. In *Firbank v. Bell* (b), which was a case similar to the present, Lord *Ellenborough* said, "There is nothing to which the name of an agreement can be given if you do not pray in aid the order." [Pollock, C. B.—The only contest there was whether the document required a stamp. Channell, B.—Suppose the bankrupts had agreed to give an order, and the defendant had notice of it, perhaps a Court of equity would have treated that as done which was contracted to be done. But here the promise was followed up by performance, and that which was done must be regarded.] The performance had reference to a written document which could not be read for want of a stamp,

(a) 2 C. & J. 368.

(b) 1 B. & Ald. 36.

and of which therefore secondary evidence could not be given.

Cur. adv. vult.

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MARTIN, B., now said.—This was an action by the assignees of a bankrupt firm to recover the balance of an account due to the bankrupts. The defence was, that the defendant had paid the amount claimed to one John Butterworth, a creditor of the bankrupts, by their order. The defendant had in fact paid the sum to Butterworth. The evidence, as to the authority to pay it, was this:—The defendant stated that Butterworth brought him an order, signed by the bankrupts, for the payment of the sum. It was objected that this document was a bill of exchange and required a stamp. I thought the objection valid, and therefore rejected the document. The defendant then contended that the evidence in the cause shewed an equitable assignment of the debt, which of course would defeat the right of action. The further evidence was the letter given by the defendant to Butterworth, dated the 20th of October, 1857, from which it is sought to be inferred that he had some order for payment from the bankrupts. Thomas Butterworth said that he called on the bankrupt, W. Dean, respecting the debt due to John Butterworth, and asked him to give an order on the defendants. He said he would do so. If we could see that there was any evidence in favour of the defendant, we should be anxious to give effect to it; but we have arrived at the conclusion that we cannot. The only authority to pay is that contained in the bankrupt's letter of the 20th of October, which could not be read for want of a stamp. There is therefore a defect in the proof, and the rule must be absolute.

Rule absolute.

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Jan. 30.

RABEY v. GILBERT.

If a party who has not had due notice of the dishonour of a bill of exchange thinks fit to acknowledge his liability, though he does so to a party other than the person who afterwards sues upon the bill, that acknowledgment is sufficient to enable the latter to maintain an action on the bill.

A. indorsed a bill to B., who indorsed the same to C. A. had no notice of dishonour. C. brought an action on the bill against both A. and B., who allowed judgment to go by default. B. paid the bill and sued A.—*Held*, that A., having acknowledged his liability on the bill by suffering judgment by default in an action by C., could not set up the want of a notice of dishonour as an answer to an action by B.

DECLARATION on a bill of exchange for the sum of 63*l.*, dated the 27th of July, 1859, drawn by W. Hodgson on T. Towning, and accepted by him, payable three months after date; indorsed by Hodgson to the defendant, and by the defendant to the plaintiff. The declaration alleged that the bill was duly presented for payment and was dishonoured: whereof the defendant had due notice.

Plea.—That the defendant had not due notice of dishonour.

At the trial, before *Bramwell*, B., at the Middlesex sittings after last Michaelmas Term, it appeared that the bill had been given by the plaintiff, who was a shareholder in a mine, to one Webb, the purser of the mine, for calls due on his shares. The bill was presented, and dishonoured, on the 30th of October. On the 2nd of November, Webb received notice of dishonour, but the defendant received no written notice until the 10th of that month. It was not denied that this was too late; but evidence was given that the defendant, who was also a shareholder in the mine, was present at a meeting of shareholders held on the 27th of December, at which a resolution was passed that the parties to the bill should be sued. The plaintiff called on the defendant, they talked the matter over, and the defendant said he would go to Truro to try and settle the matter: it was a serious business. The acceptor lived at Truro. The plaintiff and defendant, having both been sued by Webb, allowed judgment to go by default. The plaintiff paid the bill, and brought this action.

The jury found a verdict for the plaintiff, leave being reserved to the defendant to move to enter a verdict for

him, if the Court should be of opinion that the verdict on the plea denying notice of dishonour should have been found for the defendant, the plaintiff to have liberty to amend the declaration if necessary.

Collier having obtained a rule nisi accordingly,

M. Smith and *Karslake* shewed cause (Jan. 26) (a).—A party to a bill of exchange may waive the insufficiency of notice of dishonour; and the result of the decisions is that a slight admission, shewing that he does not intend to rely on the want of sufficient notice, will render him liable: *Booth v. Jacobs* (b). If the party gives to the holder an intimation that he is content to treat the notice as sufficient, or to hold himself liable on the bill, it is enough. Such an intimation may materially alter the position of the holder.—(They referred to *Brownell v. Bonney* (c), *Curlewis v. Corfield* (d) and *Jackson v. Collins* (e).)

Collier, in support of the rule.—There is a distinction between cases where the question is whether there has in fact been a notice of dishonour, and where the question is whether it has been waived. It is now established as a general rule well understood by all mercantile people, that notice of dishonour must be given on the day next after the bill has been dishonoured or the party giving the notice has himself had notice of the dishonour. When it is doubtful whether notice has been given or not, a slight admission may be sufficient to prove the receipt of the notice. But when it is certain that *no* notice has been given, strong evidence is necessary to shew that the de-

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(a) Before *Martin*, B., *Bramwell*, B., *Channell*, B., and *Wilde*, B.

(b) 3 Nev. & Man. 351.

(c) 1 Q. B. 39.

(d) 1 Q. B. 814.

(e) 17 L. J., Q. B. 142.

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defendant has agreed to dispense with the notice. What is due notice is well settled by law. If it is to become a question whether reasonable notice is to be sufficient, great uncertainty will be introduced: and it is of the greatest importance to commerce that a clear and precise rule on this subject should be maintained: per *Abbott, C.J., Williams v. Smith (a)*. In *Pickin v. Graham (b)* it was held that a subsequent promise to pay did not dispense with a due notice of dishonour. In *Borradaile v. Lowe (c)* it was held that, in order to justify a jury in inferring a waiver of notice of dishonour, there must be an unqualified promise to pay; such, for instance, as "If the acceptor does not pay I will." Here, however, the defendant was not asked to pay, and, in fact, made no such promise: he only said he would go to Truro and see if he could get it settled.

Cur. adv. vult.

BRAMWELL, B., now said.—In this case Mr. *Collier* moved for a rule to shew cause why a nonsuit should not be entered, on the ground that due notice had not been given of the dishonour of the bill of exchange on which the action was brought; the question having been raised by the plea. The notice was given at a period later than the requisite time, and there was no previous dispensation by the defendant of a proper notice. The question then is, whether a recognition by the defendant of his liability to pay the bill, although the notice was given too late, was sufficient to enable the plaintiff to maintain the action.

It is not necessary to determine whether the allegation that notice was given was proved, or whether the plaintiff should have alleged in his declaration a waiver of notice, because leave to amend was granted, and if the plaintiff

(a) 2 B. & Ald. 496. 500.

(b) 1 C. & M. 725.

(c) 4 Taunt. 93.

thinks fit to avail himself of it, an amendment may now be made. The question is whether, under either mode of declaring, viz., that the notice was given or that the defendant dispensed with it, the plaintiff is entitled to recover. We think he is.

If a person who has not had due notice of dishonour, nevertheless thinks fit to acknowledge his liability, though he does so to a party other than the person who afterwards sues upon the bill, that will enable the latter to maintain his action. For that position it is only necessary to refer to the case of *Potter v. Rayworth* (a), where the ordinary notice of dishonour had not been given, but the defendant nevertheless promised to pay a person to whom the plaintiff had indorsed the note. Afterwards the plaintiff brought his action and relied on that promise, and Lord *Ellenborough* in his judgment said, "That whether the promise to pay was made to the plaintiff or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had due notice of dishonour." That means due notice so far as he was concerned. And *Bayley, J.*, "considered the promise by the defendant either as an acknowledgment that he had had due notice of the dishonour, or that without such notice he was the proper person to pay the note, as the party for whose use it was drawn."

In this case the only fact to which it is necessary to call attention is this, that a person to whom the plaintiff had indorsed the bill brought an action upon it against the defendant, who suffered judgment by default. That was a distinct recognition of his liability to that person, and, applying the principle of the decision in *Potter v. Rayworth*, it is equally efficacious as a recognition of his liability to the plaintiff in this action. Therefore we think that the

(a) 13 East, 417.

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plaintiff is entitled to recover either on the ground of an acknowledgment by the defendant that the notice was sufficient, or on the ground of a waiver of notice.

It is not necessary to examine the cases on this subject. Many observations were made on them in the course of the argument, and perhaps it would not be easy to reconcile them; it is enough to say that *Potter v. Rayworth* is decisive, and consequently the rule must be discharged.

Rule discharged.

HILARY VACATION, 24 VICT.

MORANT v. CHAMBERLIN.

1861.

Feb. 25.

THIS was, in form, an action of assault, but it was brought to determine the question of ownership of the soil of certain land at Yarmouth, in Norfolk, and also to ascertain the rights over the land of the public on the one hand, and on the other of certain owners of property adjoining the land.

The declaration stated that the defendant assaulted the plaintiff. And also that the defendant cut, damaged, and destroyed the goods of the plaintiff, that is to say, certain ropes and harness.

Pleas.—First, to first count: Not guilty.

Second, to first count.—That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

Third, to first count.—That, before and at the said time when, &c., one George Palmer was possessed of certain land whereon the plaintiff was then unlawfully trespassing and doing damage, without the leave or license and against the will of the said G. Palmer; whereupon the defendant, as the servant of the said G. Palmer, and by his command,

The corporation of Yarmouth are, and have been since the time of King John, owners of the soil of the South Quay in that borough. The quay is bounded on the east by houses, and on the west by Yarmouth Haven. From the time of King Charles the First, there has been a common and public highway over the quay; and, so far back as living memory, the occupiers of some of the houses have used a part of the quay fronting them for depositing thereon anchors, tim-

ber, boats and other incumbrances. Such user was in fact enjoyed, as of right, for more than twenty years, but not immemorially; and though it caused some inconvenience to the public it did not produce an actual obstruction of the highway. By the rolls of the Court Leet of the borough, from the year 1632 to 1653, it appeared that many persons had been amerced for "overburdening" the quay with anchors, timber, blocks, &c., and thereby obstructing the highway. An occupier of one of the houses, in the exercise of an alleged right, placed upon a part of the quay in front of his house, anchors, timber and other incumbrances, whereby the free use of the highway was obstructed.

Held:—First, that, upon these facts, the Court (being at liberty to draw inferences) could not infer that the right claimed had been exercised by the occupiers of the houses before any dedication of the highway to the public.

Secondly: that a highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon.

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then requested the plaintiff to cease trespassing upon and leave the said land, which the plaintiff then refused to do, and thereupon the defendant, as such agent and servant, and by such command as aforesaid, at the said time when, &c., gently laid his hands on the plaintiff in order to remove him, and did then remove him from the said land, using no more force or violence than was necessary, and doing no unnecessary damage to the plaintiff on that occasion for the purpose aforesaid, which is the alleged trespass mentioned, and whereof the plaintiff has complained against the defendant.

Fourth, to first count.—That before and at the said time when, &c., one G. Palmer was lawfully possessed, as of his own property, of certain goods, and the plaintiff was then about forcibly, unlawfully, and without the leave, license, or consent, and against the wish of the said G. Palmer, to seize, remove, and carry away the said goods; and thereupon the defendant, at the said time when, &c., as the servant of the said G. Palmer, and by his command, requested the plaintiff to cease seizing, removing and carrying away the said goods, which the plaintiff then refused to do, and at the said time when, &c., continued so seizing, removing and carrying away the same; wherefore the defendant, in order to prevent such forcible seizure, removal, and carrying away of the said goods by the plaintiff, and because he could not otherwise prevent such seizure, removal and carrying away, did necessarily gently lay his hands upon the plaintiff in order to prevent the same, and thereby committed the assault in the first count complained of, using no more force or violence and doing no more damage to the plaintiff on the occasion aforesaid than was necessary for the purpose aforesaid; which are the trespasses in the first count mentioned, and whereof the plaintiff has complained against the defendant.

Fifth, to second count.—The defendant brings into Court here the sum of 1*l.*, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matters herein pleaded to.

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Replications.—First: the plaintiff joins issue on the first plea, and takes issue on the second, third and fourth pleas.

Second, to third plea.—That, before and at the said time when &c., there was, and of right ought to have been, a certain common and public highway, in, through, over and along the said land in the third plea mentioned, for all the liege subjects of our lady the Queen to go, return, pass, and repass, on foot, and with horses, carts, and carriages, at all times of the year, at their free will and pleasure; and that the plaintiff, being a liege subject of our lady the Queen, and having occasion to use the said highway, at the said time when, &c., went and passed and repassed in, through, over and along the said land in which, &c., in, by and along the said highway there, using the same as he lawfully might for the cause aforesaid; and thereupon the defendant, at the said time when, &c., of his own wrong, committed the trespass in the first count mentioned, in manner and form, &c.

Third, to fourth plea.—That the said goods in the said fourth plea mentioned were and are divers large quantities of stones and shingle, and divers anchors and pieces of timber, and masts, and spars; and that, before and at the said time when &c., the said stones, shingle, anchors, pieces of timber, masts and spars, were lying and being in, upon and across a certain common and public highway for all the liege subjects of our lady the Queen to go, return, pass and repass, on foot, and with horses, carts, and carriages, at all times of the year, at their free will and pleasure; and that the plaintiff, being one of the liege subjects

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of our lady the Queen, and having occasion to use the said highway, at the said time when &c., went and passed in, through and along the same; and because the said stones, shingle, anchors, pieces of timber, masts and spars were then lying and being in, upon and across the said highway, and obstructing the same, so that the plaintiff could not then go, pass and repass in, through and along the said highway as he ought to have done, the plaintiff, at the said time when, &c., seized the said goods in order to remove the same from and off the said highway, and to carry away the same to a small and convenient distance, and there leave the same for the use of the defendant; and the plaintiff was, at the said time when, &c., removing the said goods from and off the said highway, and carrying away the same to a small and convenient distance, doing no unnecessary damage to the said goods; whereupon the defendant, at the said time when, &c., of his own wrong, committed the assault in the first count mentioned, in manner and form, &c.

Fourth, to the fourth plea.—That the goods in the fourth plea mentioned were and are divers large quantities of stones and shingle, and divers anchors and pieces of timber, and masts and spars, and that, before and at the said time when, &c., the mayor, aldermen and burgesses of the borough of Great Yarmouth, in the county of Norfolk, were, by the council of the said borough, the Local Board of Health for the parish of Great Yarmouth, in the said borough, and surveyors of the highways within the said parishes; and that, at the said time when, &c., the said stones and shingles, anchors, pieces of timber, masts and spars were lying and being in, upon and across a certain common and public highway, situate and being within the said parish, and were obstructing the said highway so that the liege subjects of our lady the Queen could not go,

return, pass and repass in, through and along the same highway as they were wont and accustomed to do, to the great damage and common nuisance of all her Majesty's liege subjects going, returning, passing and repassing in, through and along the said highway; and that, before the said time when, &c., the said mayor, aldermen and burgesses gave notice to the said G. Palmer, and required the said G. Palmer, to remove the said goods from and off the said highway, and the said G. Palmer, although a reasonable time for that purpose, before and at the said time when &c., had elapsed, refused and neglected so to do, whereupon the plaintiff, (divers of the said liege subjects, at the said time when, &c., having occasion to use the said highway), as the servant of the said mayor, aldermen and burgesses as such Local Board of Health as aforesaid, and by the command and authority of the council of the said borough, and then being the deputy surveyor of the highways within the said parish of Great Yarmouth, at the said time when &c., seized the said goods in order to remove the same from and off the said highway, and to carry away the same to a small and convenient distance, and there leave the same for the use of the said G. Palmer; and the plaintiff was removing the said goods from and off the said highway, and carrying away the same to a small and convenient distance, doing no unnecessary damage to the goods; whereupon the defendant, at the said time when &c., of his own wrong, committed the said assault in the first count mentioned, in manner and form, &c.

Fifth, to fourth plea.—That, before and at the said time when &c., the mayor, aldermen and burgesses of the borough of Great Yarmouth, in the county of Norfolk, were lawfully possessed of certain land, and because the said goods in that plea mentioned were wrongfully in and upon the said land incumbering the same, the plaintiff, at the said time

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when &c., being the servant of the said mayor, aldermen and burgesses, and by their command, seized the said goods on the said land and so incumbering the same, in order to remove and carry away the same to a small and convenient distance, and there leave the same for the use of the defendant, doing no unnecessary damage to the said goods; and the plaintiff was, at the said time when &c., removing the said goods and carrying away the same to a small and convenient distance, doing no unnecessary damage to the said goods; whereupon the defendant, of his own wrong, committed the said several trespasses, in manner and form, &c.

Sixth, to fifth plea.—The plaintiff accepts the said 17. in full satisfaction and discharge of the claim of the plaintiff.

Rejoinders.—First: joinder in issue taken by the plaintiff's replication to the defendant's second, third and fourth pleas.

Second: joinder in issue upon the plaintiff's further replication to the third and fourth pleas.

Third: further rejoinder to the plaintiff's further replication to the defendant's third plea.—That the said public highway, and the right and privilege of the said liege subjects of our said lady the Queen to go, return, pass and repass, on foot, and with horses, carts and carriages, in, through, over and along the said land mentioned, at the said time when &c., were and the same always had been and still are subject to the right of user of the said land by the occupiers of the same for the time being, for the purpose of and by putting, placing and keeping in and upon the said land stones, shingle, anchors, timber, masts and spars, and other things; and the said occupiers of the said land have always had and still have such last mentioned right: that the said liege subjects of our said lady the Queen never had any right or privilege of going, return-

ing, passing or repassing, on foot, or with horses, carts or carriages, in, through, over or along the said land, nor was a way in, through, over or along the said land ever dedicated to or acquired by the said liege subjects of our said lady the Queen, except or otherwise than subject to such right of user of the said land by the said occupiers of the same for the time being: that, at the said time when &c., one G. Palmer was possessed and the occupier of the said land, and certain stones, shingle, anchors, pieces of timber, masts and spars were then lying and being in and upon and across the said land, the same having been before then lawfully put and placed upon the said land by the said G. Palmer, so being then possessed and the occupier of the said land, and that the said stones, shingle, anchors, pieces of timber, masts and spars were so put, placed and were so kept so lying and being in and upon the said land consistently with the rights and privileges of the said liege subjects of our said lady the Queen, and such putting, placing and keeping, lying and being of the said stones, shingle, anchors, pieces of timber, masts and spars was a use of the said G. Palmer of his said right as such occupier of the said land as aforesaid: that the plaintiff, at the said time when &c., was about forcibly, unlawfully, and without the leave, license or consent, and against the will of the said G. Palmer, to seize, remove and carry away the said stones, shingle, anchors, pieces of timber, masts and spars, and thereupon the defendant, at the said time when &c., as the servant of the said G. Palmer and by his command, requested the plaintiff to cease seizing, removing and carrying away the same; wherefore the defendant, in order to prevent such forcible seizure, removal and carrying away of the said stones, shingle, anchors, pieces of timber, masts and spars by the plaintiff, and because he could not otherwise prevent such seizure, removal and carrying away,

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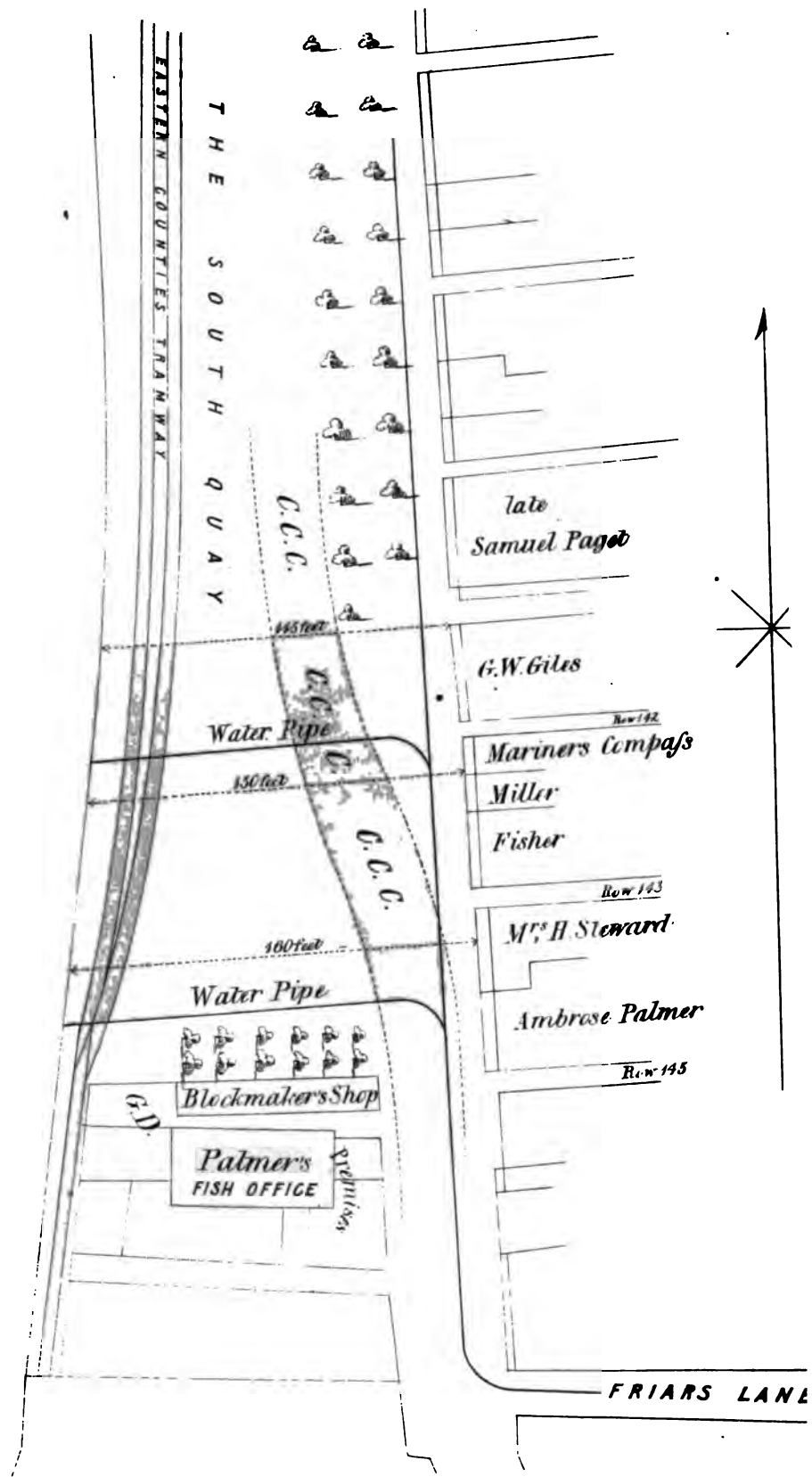
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did necessarily gently lay his hands upon the plaintiff and commit the said act in the said third plea mentioned, for the purpose and in the manner in the said plea in that behalf mentioned.

Fourth: further rejoinder to the plaintiff's further replication to the defendant's fourth plea.—That the said ways mentioned in the said replication, to which this rejoinder is pleaded, were and are the ways in the defendant's further rejoinder to the plaintiff's further replication to the said third plea mentioned, and no other ways or way whatsoever; and the defendant repeats the several allegations, statements and averments in the said last mentioned rejoinder made with respect to the said way; and the defendant avers that the said stones, shingle, anchors, pieces of timber, masts and spars mentioned in the said replication, to which this rejoinder is pleaded, were the said stones, shingle, anchors, pieces of timber, masts and spars in the said rejoinder to the plaintiff's said replication to the said third plea mentioned; and the defendant repeats the several allegations, statements and averments in the said last mentioned rejoinder made, and says that the same were and are the goods mentioned in the said fourth plea and in the said replications to which this rejoinder is pleaded; wherefore the defendant, at the time and in manner and under the circumstances mentioned in the said fourth plea, committed the said act to which that plea is pleaded, as he lawfully might for the cause aforesaid.

Fifth: further rejoinder to the plaintiff's last replication to the defendant's fourth plea.—That, at the time of the alleged trespass in the first count mentioned, the said G. Palmer was possessed of a dwelling house and premises, the occupiers whereof for twenty years before this suit enjoyed, as of right and without interruption, the right, privilege and easement of putting, placing and keeping

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goods of the same quantity, quality and description as the said goods in the said fourth plea mentioned in and upon the said land in the said replication mentioned, and thereby and therewith incumbering the same, for the same purposes and under the same circumstances as those for which the said goods in the said fourth plea mentioned were, at the said time when &c., put, placed and kept in and upon the said land, at all times of the year, for the more convenient occupation of the said dwelling-house and premises of the said G. Palmer, as to the said dwelling-house and premises of the said G. Palmer appertaining; and that the said goods so being in and upon the said land incumbering the same, as in the said replication mentioned, was a use by the said G. Palmer of the said right, privilege and easement.

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Sixth: a further rejoinder to the plaintiff's last replication to the fourth plea.—(This rejoinder only differed from the preceding one in alleging that the occupiers of the dwelling-house had enjoyed the alleged right from time immemorial.)

Surrejoinder.—The plaintiff took issue on all the rejoinders.

Demurrer to the third and fourth rejoinders.—Joinder therein.

The cause came on for trial at the Norfolk Spring Assizes, 1859, when, by consent, the question of the ownership of the soil was referred to an arbitrator, who stated the following special case:—

The locus in quo consists of certain land, indicated and coloured green on the plan hereto annexed, being part of the South Quay of Great Yarmouth, bounded on the east by certain houses and on the west by Yarmouth Haven.

It was admitted on the trial, and is now stated as a fact, that, so far back as living memory went, there had been a public highway over the locus in quo.

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And that, so far back as living memory went, there had been a user by the occupiers of the premises fronting the locus in quo for the deposit of anchors and other incumbances thereon.

The South Quay is, and since its establishment has been, a public quay, and has been much in use for the loading and unloading of ships. It has always been one of the main roads leading from and to other roads of the town. The road is indicated by the open space marked on the plan "The South Quay;" and the part of the locus in quo on and over which the occupiers hereinafter mentioned claimed to have and enjoy the right hereinafter mentioned to have been enjoyed by them, is an open space between a certain tramway and the carriage track marked *C C C* on the plan.

As to the borough and port of Yarmouth.

King John, by charter, confirmed to the burgesses of Yarmouth the borough and port in fee farm for ever, with the power to hold courts in the borough. (The history of the port is referred to in Hale's *De Portibus Maris*, p. 61.) The present corporation consists of the mayor, aldermen, and burgesses of the borough, and forms the Local Board of Health for the parish of Great Yarmouth in the borough. Various local Acts have been passed for the regulation of the port and the government of the borough, to some of which reference will be hereafter made.

As to the soil of the locus in quo.

I find that it passed to the corporation by the charter of King John, and that they have ever since been the owners.

As to the road in question.

The date of the origin did not appear, but I find that it was used as a public road in the reign of Charles the First, during and after which certain proceedings were taken, as hereinafter mentioned, for obstructing the road.

By the rolls of the South and South Middle Court Leet

of the borough, from the 8th Charles the First (1632) to 1653, it appears that many persons were presented and amerced for committing nuisances on the quay. In some instances the offence was described as "overburdening the quay of the town with anchors, planks, masts, and divers other things." In another, as permitting their timber to lie upon "The Keys of the Town aforesaid, to the destruction of the same." In another, the several parties are charged that they did "overburden the Common called the Dean-side and the Keys next their mansion house, within the precincts of this view of frankpledge, and divers anchors, store, stacks of deals did erect and construct, to the annoyance," &c.

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In several the parties are presented "for overburdening the keys next their houses with timber, planks, stacks of deals and heaps of stores, to the annoyance," &c. In one it concludes, "to the the annoyance of our lord the King. Therefore in mercy 3*l*."

And in 23rd and 24th Charles 1st, is as follows:—

"That Luke Herring . . . 2*s*. 6*d*.,
 Roger Townsend . . . 13*s*. 4*d*.,

overburdened the key of the port of Great Yarmouth with timber, blocks, &c., that the passage of the people on the quay is very much impeded, to the annoyance, &c. Therefore," &c.

Another as follows:—

"That Thomas Johnson . . . 6*s*.
 William Linstead . . . 30*s*.
 George Spilman . . . 10*s*.
 Thomas Taylor, Junr. . . 5*s*.
 Thomas Felstead . . . 2*s*.
 Nathaniel Thirser . . . 5*s*.
 John Thirser . . . 6*s*. 8*d*.
 Thomas Barker . . . 2*l*. 6*s*. 8*d*.
 Matthew Gibbs . . . 30*s*.,

the key of the town of Great Yarmouth with timber, wood,

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blocks, planks, overburdened, to the impediment and obstruction of the free passage of the people of our lord the King upon the key. Therefore," &c.

In 1650 is the following:—

“South and South Middle Leet.

“The jurors say, on their oaths, that Luke Herring, 10s. (then follow other names, with various sums), overburdened the key of the town of Great Yarmouth, within the precinct of this view of frankpledge, with timber, wood, blocks and posts, by which the transit and passage of people on the key there is much impeded and obstructed, to the annoyance, &c. Therefore every of them amerced,” &c.

In several cases the persons are charged with annoying the key with anchors and other things near the mansion houses of others, and are amerced.

In 1651 as follows:—

“John Jennison doth annoy the key before his mansion house with four piles of barrel staves. Therefore,” &c., 2s.

The above house was the house, or was the site of the house, of one of the occupiers of the houses opposite which is the locus in quo.

The above amerciaments appear to have been paid.

In 1772 an act of parliament (12 Geo. 3, c. 14,) was passed for (among other objects) improving the haven and piers of Great Yarmouth; by section 33 of which it was provided, that persons should not (under a certain penalty) lay any ballast, earth, sand, rubbish or stones on the quays within ten feet of the quay head. There is a section to the same effect (with some variation in terms) in the 25 Geo. 3, c. 36, s. 8 (1784). And by the 39 & 40 Geo. 3, c. 4, s. 14, there is a provision against placing materials on the quays.

In 1810 (50 Geo. 3, c. 23), an Act was passed for (among other objects) removing nuisances and annoyances in the town; by section 54 of which provision is made against

the placing of materials or other things upon any of the quays, markets, streets, lanes, rows, public passages or places for any longer time than shall be necessary for moving and housing the same.

An Act was passed in 1835, 5 & 6 Wm. 4, c. xlix., in which, by sections 76 and 77, there are additional provisions against placing articles on the quays.

The goods in question, mentioned in the pleadings in this cause, were not placed or continued on the land in question under circumstances which, according to either of the above Acts, entitled them to be so placed or continued.

In 1847, an Act was passed to enable the Norfolk Railway Company to extend their railway to Great Yarmouth. By section 11 and following sections, provision was made for making a tramway along the road in question. Such tramway was made about the year 1848, and has since been used according to the provisions of that Act. Its course is indicated on the annexed plan.

As to the user to deposit anchors and other incumbrances on the locus in quo.

It was admitted on the trial, and is now stated as a fact, that, so far back as living memory went, there had been a user by the occupiers of the premises fronting the locus in quo for the deposit of anchors and other incumbrances thereon.

I find that such user was in fact for more than twenty years before this suit enjoyed by the occupiers as a right and without interruption. But I find that such was not immemorial.

The user was by those persons, for the time being, for their own convenience and in general for their own several businesses; and the various articles were placed and remained on the road in point of time according to their pleasure,

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entirely unconnected with any ordinary public use of the road for the purpose of transit. The articles placed there were chiefly anchors, timber, boats, material for ballast, casks, shingle and naval stores. This user was not uniformly confined by the occupiers to their own business. Upon some occasions the liberty to use the spot in front of the house of one occupier was let by him to another of those occupiers, at a yearly rent.

Such user caused some degree of inconvenience to the public in the ordinary use of the road, but did not produce actual obstruction. The width of the road at the locus in quo is indicated on different parts of the annexed map.

As to the immediate cause of action.

The plaintiff, being deputy surveyor of the highways of the parish in which the locus in quo is situated, and surveyor to the corporation, and surveyor to them as the Board of Health, went by their authority to remove certain articles which had been placed on the locus in quo by the said G. Palmer (who is to be taken as having the rights of one of the occupiers of the houses in question and who had received notice to remove the goods). They consisted of several anchors, a boat, the lower mast of ship, several pieces of timber, some chain cable and a quantity of shingle. These had been placed, not in exercise of the ordinary public use of the highway over the locus in quo, but solely in exercise of the alleged right of the occupiers as before described. And in fact, to enable the public to have the free and ordinarily convenient public use of such highway, it was necessary to remove them. The defendant, under the authority of the occupiers of the houses, and in their belief of their right, offered a certain resistance to the plaintiff, in the course of which (but not in his own defence as pleaded) an assault was by him committed, and the resistance was

then by him withdrawn. Should the judgment of the Court be for the plaintiff, it is agreed that the damages on the first count shall be 3*l.* 5*s.*

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The Court are to have the power to draw any inferences of fact necessary to the decision of the case, and to direct how the issues joined in the case should be entered.

The question for the opinion of the Court is, how the finding on the issues is to be entered. If the judgment be for the plaintiff, it is to be with 5*l.* 5*s.* damages.

O'Malley argued the special case for the plaintiff in last Trinity Term (June 4).—Upon the facts stated in the special case, the plaintiff is entitled to judgment on the issues joined on the first, second and third pleas. The second replication to the third plea, which alleges a public highway over the locus in quo, ought also to be found for the plaintiff. To that replication there is a rejoinder, that the highway was subject to the right of user of the land by the occupiers of the same, for the purpose of putting certain goods thereon. But the Court cannot infer, from the facts stated in the case, that the highway was dedicated to the public subject to such right of user. Therefore the issue joined on that plea ought also to be found for the plaintiff. The defendant, by the fourth plea, justifies the assault as the servant of Palmer, and in order to prevent the forcible removal of his goods. To that plea there are three replications, in substance alleging that the goods were obstructing the highway, and these replications with the rejoinders thereto, which set up the same right of user, ought also to be found for the plaintiff. An obstruction of a public highway is a common nuisance which anyone may abate; *James v. Hayward* (a), *Lodie v. Arnold* (b). [*Channell*, B., referred

(a) Cro. Car. 184; S. C. Sir W. Jones, 221.

(b) 2 Salk. 458.

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to *The Mayor of Colchester v. Brooke* (a).] The arbitrator has found that the right to incumber the soil is not immemorial, and that there has been a highway over the locus in quo from the time of Charles the Second; therefore it will be presumed that the highway existed prior to the alleged right of user.

Keane argued the special case for the defendant.—The issue on the third plea ought to be found for the defendant. Palmer had, as against the plaintiff, such a possessory right as would have enabled him to maintain trespass: *Every v. Smith* (b). [*Bramwell*, B.—According to that, if a person fishes without permission in the pond of another, he may say to the latter, “You have no right to disturb me, because I am in possession.” The issue on the third plea ought to be found for the plaintiff.] The issue on the second replication to the third plea ought to be found for the defendant. That replication should have stated that the plaintiff was passing along the highway: *Dovaston v. Payne* (c). The interest of the public in a highway consists solely in the right of passage: 2 Smith’s Lead. Cas. 118. If a person is on a highway for any other purpose than using it as a highway he is a trespasser: *Regina v. Pratt* (d). [*Bramwell*, B.—We are all of opinion that the plaintiff was on the highway in a legal sense, and that there ought to be judgment for him on that replication.] The issue on the third replication to the fourth plea ought also to be found for the defendant. The case falls within the principle of *Rex v. Tindall* (e), which decided that a person is not criminally responsible for a nuisance, the consequences of which are slight, uncertain and rare. The plaintiff has no legal ground of complaint unless there was a substantial

(a) 7 Q. B. 339.

(b) 26 L. J. Exch. 344.

(c) 2 H. Black. 527.

(d) 4 E. & B. 860.

(e) 6 A. & E. 143.

obstruction of the highway: *Rose v. Groves* (a). If a person traversing a highway finds a slight obstruction in his path which he can avoid by going round it, he must do so. This replication should have shewn that it was absolutely necessary for the plaintiff to remove the defendant's goods in order to exercise his alleged right of way: *Dimes v. Petley* (b), *The Mayor of Colchester v. Brooke* (c), *Bateman v. Bluck* (d), *The Eastern Counties Railway Company v. Doring* (e). The issue on the fourth replication to the fourth plea ought also to be found for the defendant. The fines which are recorded on the rolls of the Court Leet were inflicted, not for "burdening," but for "overburdening" the land. *Elwood v. Bullock* (f) is an authority that a highway may have been granted before legal memory, subject, in parts, to interruption for a beneficial purpose, and for a limited time. Here the right claimed may have been coeval with the dedication of the close as a highway. Moreover, this was not such an obstruction as justified the Corporation, as the Board of Health and surveyor of highways, in removing the goods: *Le Neve v. The Vestry of Mile End Old Town* (g), *The Proprietors of the Witham Navigation v. Padley* (h). The proper course would have been to proceed under the 73rd section of The Highway Act (5 & 6 Wm. 4, c. 50). The issue on the fifth replication to the fourth plea ought also to be found for the defendant. By acquiescence, for a space of time as far back as legal memory, the occupiers of the adjoining houses have acquired a right to place certain goods on the locus in quo. The issue on the sixth rejoinder to the last replication to the fourth plea ought also to be found for the defendant. The 12 Geo. 3, c. 14, s. 33, and subsequent

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- (a) 5 Man. & G. 613.
- (b) 15 Q. B. 276.
- (c) 7 Q. B. 339.
- (d) 18 Q. B. 870.

- (e) 5 C. B. N. S. 821.
- (f) 6 Q. B. 383.
- (g) 8 E. & B. 1054.
- (h) 4 B. & Adol. 69.

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Acts, are in affirmance of the common law; therefore, notwithstanding those statutes, a person may prescribe in respect of a right to place goods on the quay. In Co. Litt. 115 a, it is said:—"If a statute in the negative be declaratory of the ancient law, that is, in affirmance of the common law, there, as well as a man may prescribe or allege a custom against the common law, so a man may do against such a statute." [*Pollock*, C. B., referred to the 56th section of the Highway Act.]—He also referred to the 26th section of that Act.

O'Malley was not called on to reply.

Couch argued in support of the demurrers to the rejoinders.—The third and fourth rejoinders are bad upon this broad ground, that the alleged right of user is without limit. Although it is admitted that there is a highway over which all persons have a right to pass, the occupiers of the adjoining land claim a right to obstruct it at any time, and to any extent they may think fit. In all the cases the right claimed has had some limit. In *Le Neve v. The Vestry of Mile End Old Town* (a) the occupiers of the adjoining houses claimed a right to use the intermediate space between the footway and carriage road in such a manner as suited their trades or occupations. *Poole v. Huskinson* (b), which supports the proposition that there may be a limited dedication of a highway to the public, shews that there cannot be a dedication to a limited part of the public. In *Elwood v. Bullock* (c), the right claimed was by persons exercising the trade of victuallers to erect booths on a highway during a fair. That custom was held good on the ground of the benefit which might be supposed to arise from the accommodation afforded to persons fre-

(a) 8 E. & B. 1045.

(b) 11 M. & W. 827.

(c) 6 Q. B. 383.

quencing the fair. In *The Marquis of Stafford v. Coyney* (a) there was a user by the public of a road for all purposes except that of carrying coals; and that was held to be either a limited dedication to the public or a license. A highway cannot be subject to a user, by particular persons, inconsistent with its use by the public as a highway: *Rex v. The Inhabitants of Leake* (b). The fifth rejoinder is also bad, since this is not a case within the second section of the Prescription Act, 2 & 3 Wm. 4, c. 71. The sixth rejoinder is also bad, for the alleged right cannot be claimed as an easement over the land of another, because there is no dominant tenement. An easement, as such, can only be claimed as accessory to a tenement, and it must be of something which is necessary for the more convenient use or enjoyment of the tenement. Even a grant of an easement, such as that now claimed, would be bad as not being sufficiently definite.

Malcolm, in support of the rejoinders.—A right of way over land may exist, subject to the right of the occupiers of the adjoining land to place goods thereon. The user must have been consistent with the rights and privileges of the public in passing over the land, or it could not have existed. It is claimed as a user by the occupiers of the land, and it is stated that they used the land consistently with the rights and privileges of the public. Therefore the two rights may in law co-exist. There is a dominant tenement, and the user is for the more convenient occupation of the premises in respect of the trades of the occupants. The case is also within the Prescription Act.

Couch, in reply, cited *Manning v. Wasdale* (c).

Cur. adv. vult.

(a) 7 B. & C. 257.

(b) 5 B. & Adol. 469.

(c) 5 A. & E. 758.

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The judgment of the Court was now delivered by

CHANNELL, B.—This was a special case for the opinion of the Court, argued before the Lord Chief Baron, my brother *Bramwell* and myself. I have now to deliver our judgment.

We are called upon, with reference to the facts stated in the case and the power to draw inferences therefrom, to decide in what way the verdict upon the several issues ought to be entered. We are also to give our judgment on the demurrers in the cause.

The plaintiff having accepted the money paid into Court in satisfaction of the causes of action mentioned in the second count, the complaint in the declaration is confined to the first count, which is one of assault.

To this count for an assault four pleas have been pleaded. Upon the facts, as stated in the special case, it is very clear that the issue on the first and second of those pleas must be found for the plaintiff. The third and fourth pleas, and the several issues of fact and in law consequent upon them, are to be dealt with.

On the two last pleas issues have been joined.

In addition to the issue on the third plea, that plea is specially replied to. The replication thereto results in a rejoinder by way of confession and avoidance, on which issue is joined, and in a demurrer to the rejoinder.

The fourth plea is also specially replied to, and by as many as three several replications; which replications result, first, in traverses of the matter replied; secondly, in several rejoinders by way of confession and avoidance, on which issues by way of surrejoinder have been taken; and, lastly, in a demurrer to the rejoinders.

Notwithstanding the multiplicity of the pleadings, the case, as to the right of the plaintiff or defendant to such a

verdict as will decide the cause, may be very shortly stated.

If neither the third nor the fourth plea is proved in fact, or, being proved, the plea or pleas proved are got rid of by the verdict which upon the several issues consequent upon such plea or pleas ought to be entered, then the general verdict will be for the plaintiff for the damages agreed upon; and this though the defendant may upon some subordinate issues be entitled to have the verdict entered for him.

If, on the other hand, either the third or fourth plea is proved in fact, and not displaced by the verdict which we direct to be entered upon the subsequent issues arising out of such plea, or by our decision upon the demurrers, then the defendant will be entitled to our judgment, though consistently therewith the plaintiff may yet be entitled on some of the issues to a verdict for him.

It may be convenient to see what are the main facts found by the special case. It must be taken that the corporation of Yarmouth are the owners of the soil of the locus in quo referred to in some of the pleadings, and described on the plan which accompanies the case, and that they have been so from the time of King John: that over the locus in quo there is, and at least from the time of Charles the Second has been, a common and public highway: that the acts done by the defendant amounted to an actual obstruction in point of fact of the existing highway. If so, the defendant is without defence founded on any mere ordinary user by him, as one of the public, of a way over the locus in quo. His defence, if any, is by reason of his occupation of land adjoining to the locus in quo giving him, as he contends, the right to burden the soil of the corporation of Yarmouth. As regards the way set up by

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the pleadings, and said to have been obstructed, his defence is that such way was only dedicated to the public subject to the right of the owners of the adjoining premises to deposit goods there.

With respect to the right claimed by the defendant, the case finds that there has been a user, in fact corresponding with the acts sought to be justified, when such acts did not amount to an actual obstruction of the use of the way by the public; that such user has been exercised as far back as living memory goes, under a claim of right (that is, not stealthily or clandestinely), and at least for twenty years, but not immemorially. These facts are, we think, clear upon the findings in the case.

Now, though it is found that for more than twenty years, and as far as living memory goes, but, as we have observed, not immemorially, parties who have claimed as of right an interest similar to that claimed by the defendant have exercised and used the easement now claimed, yet it is also found that the highway has existed, not only during all the time of living memory, but at least from the time of Charles the Second. It has been contended before us, by the defendant, that the right claimed by him may have been exercised, and ought to be taken as having been exercised, over the locus in quo, by parties occupiers of the respective premises in front of the way or adjoining thereto, before any dedication by the corporation of a way to the public; and that, if so, a right was acquired against the corporation as owners of the soil which their subsequent dedication to the public would not destroy.

But this view, viz. the fact of a right in the occupiers of the adjoining premises pre-existent to the dedication of the way to the public, is not, we think, made out, and it is for the defendant to make it out.

The entries in the case do not, in our judgment, warrant us in drawing any such inference. We do not think that we ought to infer from the word "over-burdened," or from the other words of similar or nearly similar import to be found in the entries proved in the case, that the occupiers of the adjoining lands had really a *right* to burden the way, and were fined only for an excessive use of their right, but that at most these entries shew that when the way, as a way, was actually obstructed, then the parties offending were liable to be fined. In the present case we must, upon the facts found, assume that the acts complained of amounted to an obstruction of an existing highway and the use of it by the public as such, and therefore, unless we can see that the defendant has made out that a way clearly dedicated to the public was so dedicated subject to the right claimed by him, an inference which we decline to draw, the plaintiff will be entitled to the general verdict. The statutes referred to in the case do not seem to us to assist the defendant. The rights claimed by the defendant appear to be in violation of the rights of the public, to be gathered from those statutes.

There is no difficulty in holding in what way the verdict ought to be entered, so as to decide the cause. As regards one or two of the issues affecting only the question of costs, and as respects the demurrers, there may be room for some doubt.

Applying the facts as we collect them from the special case, and exercising the power conferred on us of drawing inferences, it seems to us that the verdict should be entered for the defendant on the issue joined on the defendant's fourth plea, but not on the issues joined on the special replications thereto; and that the verdict should also be entered for the defendant on the issue on the rejoinder to the plaintiff's last replication but one to the defendant's

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fourth plea. On all the other issues in fact we direct a verdict for the plaintiff. As to the matters on which we direct the verdict to be entered for the plaintiff, we think the case is concluded by the finding of the arbitrator, who under the order of *Nisi Prius* has settled the case.

As the pleas are, in effect, got rid of by our decision on the issues in fact, the question as regards the demurrers is only one of costs.

We think that it has not been made out that there was, in point of fact, such a dedication of a way as the defendant has contended for. In point of law, we are disposed to think that such a dedication might be made. (See the case of *Le Neve v. The Vestry of the Hamlet of Mile End Old Town* (a), cited by the defendant.)

We think that the defendant is entitled to our judgment upon the demurrers which apply to the rejoinder to the first replication to the fourth plea.

Our judgment on the whole is, that a verdict be entered for the plaintiff for five guineas damages. This decision to be subject to the defendant's right to costs in respect of the demurrers referred to, and on the issues directed to be found for him.

Judgment accordingly.

(a) 8 E. & B. 1054.

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GEORGE COWLEY and MARY, his Wife, v. THE MAYOR,
ALDERMEN AND BURGESSES OF THE BOROUGH OF
SUNDERLAND.

Feb. 25.

THE declaration stated that the defendants, before and at the time of the committing of the grievances, &c., were the owners and proprietors of certain public baths and washhouses in Sunderland, established under the provisions of an act of parliament made and passed in the tenth year of the reign of her present Majesty, intituled, &c. (9 & 10 Vict. c. 74), and of certain engines, boilers and a wringing machine, moved by steam power supplied by the defendants, erected and set up therein; and which were respectively erected and set up by the defendants for the purpose, amongst other things, of their being used by persons to wash, wring and dry clothes therein, for hire and reward paid to the defendants in that behalf; yet the plaintiffs in fact say that, at the time of the committing of the grievances, &c., the said machinery, engines, boilers and wringing machine were so negligently, carelessly, insecurely and improperly constructed, erected and set up for the purpose aforesaid, and the defendants so negligently, carelessly and improperly conducted themselves in and about the premises, and in about the management and supplying of the steam power aforesaid, that by reason of the premises and of the

The defendants, a body corporate, erected baths and washhouses under the provisions of the 9 & 10 Vict. c. 74. This Act vests the property in the baths and washhouses in the corporation, but their management in the town council. For the purpose of drying clothes, there was a wringing machine, which consisted of a cylinder into which the wet clothes were put, and which was made to revolve with great rapidity by steam power. This machine was originally constructed to be worked by hand by means of an ordinary wynch-handle. In applying steam power this handle was removed, but an iron rod to which it had been affixed was unnecessarily allowed to remain. The plaintiff, who had paid for permission to wash, was using this machine when the iron rod caught the sleeve of her gown, and she was dragged towards the machine and severely injured, without any negligence on her part. When it was proposed to apply steam power to the machine, the defendants were told of its danger.—*Held*, that the defendants, by availing themselves of the provisions of the 9 & 10 Vict. c. 74, had undertaken a statutory duty which bound them to exercise ordinary care and diligence in providing machines reasonably safe for use, and that they, and not the town council, were liable for the injury sustained by the plaintiff.

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improper construction and adaptation of such wringing machine as aforesaid, and of the improper application of such steam power as aforesaid, the said Mary, then being the wife of the plaintiff, and whilst she was lawfully using the same for the purpose aforesaid, and for hire and reward paid by her to the defendants in that behalf, and in the course of the lawful and proper use thereof, became and was caught and got entangled with the said wringing machine, and was greatly whirled and dragged about and received great bodily injury, &c.

Pleas.—First: Not guilty. Second: That the said machinery, engine and boilers, and wringing machine, were not so negligently, carelessly, insecurely or improperly constructed, erected or set up as alleged.—Issues thereon.

At the trial, before *Wilde, B.*, at the last Durham Summer Assizes, it appeared that the defendants, the corporation of Sunderland, had erected public baths and washhouses in the High Street of that town, under the provisions of the 9 & 10 Vict. c. 74. On the 19th of January last the female plaintiff was washing there. She had paid four pence for permission to wash a certain time. Having washed some clothes, she placed them in a wringing machine. This machine consisted of a cylinder about three feet in diameter and four feet high, into which the wet clothes were placed, and it was made to revolve by steam power at the rate of fifty revolutions in a minute. The machine was originally constructed to be worked by hand by means of an ordinary wynch-handle affixed to a spindle. This handle had been removed, but a small iron rod to which it had been attached was allowed to remain. The female plaintiff was in the act of stopping the machine, when the iron rod caught the sleeve of her gown, and she was dragged towards the machine and severely injured. There was no one attending upon her at the time. When it was proposed to work this

machine by steam power, one of the town council, who was a practical builder and a member of the baths and wash-houses committee, told the engineer of the corporation that it was dangerous to apply steam power to a wringing machine. There were other wringing machines in this washhouse, which were worked by hand; and in the other washhouses in Sunderland all such machines were so worked.

At the close of the plaintiffs' case, it was submitted on behalf of the defendants that they were not liable. The learned Judge reserved the point, and evidence was adduced on the part of the defendants to prove that the machine was not dangerous, and that the female plaintiff was careless in her use of it.

The learned Judge left it to the jury to say: first, whether the female plaintiff, in using the machine, was guilty of any negligence which contributed to the accident; secondly, whether the defendants were guilty of negligence in the construction of the machine, or in not having attendants to see to the use of it. The jury answered the first question in the negative, and the second in the affirmative, and found a verdict for the plaintiffs, with 50*l.* damages, leave being reserved to the defendants to move to enter the verdict for them.

Manisty, in the present Term, obtained a rule nisi accordingly, on the ground that there was no evidence of any duty, or of the breach of any duty, or of any negligence by or on the part of the defendants; or why a new trial should not be had on the same ground; or why the judgment should not be arrested, on the ground that the declaration disclosed no ground of action against the defendants.

Price and *Davison* shewed cause, in last Michaelmas Term (Nov. 17).—First, there was a breach of duty on the part of the defendants for which they are responsible. They

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erected baths and washhouses under the provisions of the 9 & 10 Vict. c. 74, and, having the management and control of them, it was their duty, when they invited the public to use a machine worked by steam power, to take care that it was safe. A corporation is not exempt from any liability which attaches to an individual, if guilty of negligence; and it is clear that if this machine had been the property of an individual he would, under such circumstances, have been liable. [*Martin*, B.—If an individual said, there is a wringing machine, you may use it, would he be responsible if the machine was not safe?] The defendants knew that the machine was dangerous, and therefore ought not to have invited the public to use it: *Gibbs v. The Trustees of the Liverpool Docks* (a). [*Wilde*, B.—The declaration does not allege negligence.] Such an allegation, if traversed, would have raised an immaterial issue. In *Blakemore v. The Bristol and Exeter Railway Company* (b), which was the case of a gratuitous lender of a chattel which he knew was in an unsafe condition, it was laid down that “the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured.” The defendants ought not to have applied steam power to a machine intended to be worked by hand; neither should they, knowing its dangerous condition, have left the machine unguarded. The case resembles that of a person who, having a gun which he knows is dangerous to

(a) 3 H. & N. 164.

(b) 8 E. & B. 1036.

use, chooses to let it for hire. [*Martin, B.*, referred to *Cornman v. The Eastern Counties Railway Company (a)*.] In *Green v. The London General Omnibus Company (b)*, *Erle, J.*, in delivering the judgment of the Court, said:—"The whole course of the authorities, from the case of *Yarborough v. The Bank of England (c)* down to *Whitfield v. The South Eastern Railway Company (d)*, which was in reality an action against *The Electric Telegraph Company*, shews that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual." [*Bramwell, B.*—In *Cornman v. The Eastern Counties Railway Company (a)*, the injury was caused by a weighing machine which had been in the same situation for five years, and there is no pretence for saying that such a machine is not a proper thing for a railway Company to have on the platform of their station. Here it was proved that it was dangerous to apply steam power to a wringing machine, and that the machine was in the first instance intended to be worked by hand.] *Manley v. The St. Helens Railway Company (e)* is also an authority in favour of the plaintiff. [*Channell, B.*—There the Company had a beneficial interest in the tolls, and were therefore liable, as any proprietor of private property would be.] In *Gibbs v. The Trustees of the Liverpool Dock (f)* the defendants received no profits, but merely performed a public duty, and yet they were held responsible for negligence. Here the defendants are in the position of an individual, because they have availed themselves of the provisions of the 9 & 10 Vict. c. 74, to erect baths and washhouses; and they make

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(a) 4 H. & N. 781.

(b) 7 C. B., N. S. 290.

(c) 16 East, 6.

(d) E. B. & E. 115.

(e) 2 H. & N. 840.

(f) 3 H. & N. 164.

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a charge for the use of them. Secondly.—It will be argued that the council, not the defendants, are liable. But the 27th section vests the property in the baths and washhouses in the corporation. By the 29th section, the council shall not be personally “liable to the payment of any sum of money as or by way of compensation or satisfaction for or in respect of anything done or suffered in due pursuance of that Act.” The action, however, is properly brought against the corporation, the council being only their servant, and the corporation are entitled to reimburse themselves out of the rates for any sum which they may be required to pay: *Ruck v. Williams (a)*. [*Wilde, B.*—By the 9 & 10 Vict. c. 74, the council are authorized to erect baths and washhouses, to make charges for the use of them, and to detain the clothes of persons refusing to pay the charges. The Act contains two schedules, the one relating to byelaws, the other regulating the charges. Persons who choose to avail themselves of the provisions of this Act ought to take proper means of securing their machines, so that persons using them may not be injured, and if they neglect to do so, it may be that there is a liability arising from the Act.] There is an implied undertaking, on the part of the corporation, that the things which they provide for the use of the public may be used without danger. Suppose they constructed baths which were dangerous for boys, could they shelter themselves by saying the use of them was voluntary?—They also argued that the declaration was good after verdict, the jury having found negligence.

Manisty (with whom was *T. Jones*), in support of the rule.—First, there was no duty on the part of the defendants for the breach of which they are responsible. As regards this tort, there is a difference between the corpora-

(a) 3 H. & N. 308.

tion and town council. In non-corporate towns the Act is to be carried out by commissioners elected by the vestry; but in corporate towns the individuals who constitute the town council are vested with the same powers as those commissioners. The legislature has provided that no member of the council or commissioner shall be personally liable (sect. 29). [*Wilde, B.*—The 32nd section makes the matter plain. It provides that whenever the council, or vestry, on the recommendation of the commissioners, determine that the baths shall be sold, the corporation shall convey them.] That is only a statutory mode of conveyance. [*Wilde, B.*—The 20th section incorporates the commissioners, but there is no enactment incorporating the council, and by the 27th section the property in the baths is vested in the corporation.] It is submitted that in a case of this kind the commissioners would not be liable, and, if so, no action will lie against the council or corporation. It was never intended that the corporation should be responsible for the acts of the council. The legislature has invested the council with certain powers for the erection and management of baths and washhouses, and there is no common law or statutory liability on the part of the corporation. Assuming that the corporation are in the position of individuals who are the owners of baths and washhouses, which the legislature has authorized them to erect, since they have no beneficial interest in the funds derived therefrom they are not responsible: *Metcalfe v. Hetherington* (a). The only duty on the part of the corporation is to employ a competent engineer. Secondly.—There was no evidence of negligence. The female plaintiff knew the construction of the machine and was aware of its danger. She voluntarily used it, and therefore cannot recover. Moreover it is con-

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(a) 11 Exch. 257.

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sistent with the evidence that the injury was caused by her own negligence.—He also argued that the declaration was bad in arrest of judgment, inasmuch as it did not disclose on the face of it any duty on the part of the defendants.

Cur. edr. vult.

The judgment of the Court was now delivered by

WILDE, B.—In this case the plaintiffs complained of the injury caused by the negligent construction of a machine set up by the defendants, and used in some public wash-houses erected by them under the provisions of the 9 & 10 Vict. c. 74.

It appears that the wife of the plaintiff resorted to the washhouses in question, and paid four pence for the use of the machines and other conveniences of washing there for a given time. The machine in question, by which the injury was done, was a drying-machine. It consisted of a cylinder, into which the wet clothes were put, and made to revolve with great rapidity, and the water driven out by the operation of centrifugal force. The machine was originally constructed to be worked by an ordinary wynch-handle connected with the top of it, such handle being turned by the hand of the person using it, and there were a considerable number of these machines in the washhouse.

A proposition was made among the members of the corporation to introduce steam. There was evidence to shew that this was objected to by some competent persons as likely to prove dangerous. It was, however, adopted; and, at the time of the accident, the machine in question was turned by steam power.

In applying the steam power in place of the hand, the wynch-handle was taken off: but the rod on which it had

been fixed was allowed to remain. This rod was quite unnecessary and useless to the machine as worked by steam. It projected some distance over the edge of the top of the machine, and revolved with great rapidity while the machine was in action.

The plaintiff's wife, in using the drying machine, allowed a portion of her dress to touch this rod; it was caught by it, and she was drawn against the revolving rod, and considerably injured.

At the trial it was contended that she was guilty of negligence in the way she used the machine, but this was negatived by the jury.

The jury found that the machine was dangerously and negligently constructed, and that the accident with which the female plaintiff met was caused by such dangerous and negligent construction of the machine. A verdict passed for the plaintiffs, leave being reserved to the defendants to move this Court to enter a verdict for them.

It was argued by the defendants that the statute in question imposed no responsibility or liability whatever on the corporation, but only on the council to whom the erection and management of the washhouses were confided. But several clauses of the Act were pointed out during the argument which tended to negative this proposition. It is unnecessary to refer to them again in detail.

It is sufficient to say that, in our opinion, the legislature did not intend to withdraw from the corporation, to whom the washhouses belonged, the responsibility which might attach to any improper construction or management of them.

It was then argued that, as the plaintiff was a volunteer and chose to use the machine such as it was, she could not recover.

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But we think this argument does not avail the defendants. The statute was passed for the benefit of the poor and more ignorant classes of the population. The corporation chose to avail themselves of their powers to erect these washhouses. In discharge of the statutory duty thus undertaken by them, we think they were bound to exercise ordinary care and diligence, and provide machines reasonably safe for use.

It is clear, from the evidence and the finding of the jury, that the projecting rod which did the mischief was unnecessarily, carelessly and dangerously allowed by the defendants to remain after all use and purpose in it had ceased. It is also clear that this danger was one which the plaintiff might reasonably fail to perceive or appreciate, and the jury have, in substance, found that neither in the fact of using the machine at all, nor in the particular mode of using it by the plaintiff, was there any negligence. The accident was caused by the immediate negligence of the defendants, and on an occasion when the plaintiff was in no way to blame.

We think the plaintiffs' verdict ought to stand, and this rule be discharged.

Rule discharged.



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TASKER v. SHEPHERD.

Feb. 25.

THE declaration stated that by an agreement in writing made and entered into on the 17th June, 1857, between one Emanuel Bentley, since deceased, and the defendant, of the one part, and the plaintiff of the other part, the said Emanuel Bentley, now deceased, and the defendant, who at the date of the said agreement were carrying on business as stone merchants in copartnership, appointed the plaintiff their sole London agent for a period of four years and a half from the date of the said agreement; and the plaintiff, in consideration of the premises, agreed to accept and undertake the said appointment and duty upon the terms following, *videlicet*, that the said Emanuel Bentley, now deceased, and the defendant should pay to the plaintiff the sum of two pounds and ten shillings per centum on all accounts received by them for stone sold or caused to be sold by the plaintiff, or supplied by the said Emanuel Bentley, now deceased, and the defendant to any person originally introduced to them by the plaintiff (deducting the boat freights to a certain place called Goole from the amount): that the plaintiff should pay the whole of his travelling expenses, and attend upon any business in London of the said Emanuel Bentley, now deceased, and the defendant, when required by them in writing: that the

A declaration stated that by agreement in writing between B., since deceased, and the defendant, of the one part, and the plaintiff of the other part, B. and the defendant, who at the date of the agreement were carrying on business as stone merchants in copartnership, appointed the plaintiff their sole London agent for a period of four years and a half, and the plaintiff in consideration of the premises agreed to accept the said appointment upon the terms (amongst others) that B. and the defendant should pay the plaintiff 2l. 10s. per cent. on all accounts

received by them for stone sold by the plaintiff, or supplied by B. and the defendant to any person originally introduced to them by the plaintiff.—Breach: that the defendant did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half, and did not nor would execute certain orders for stone procured by the plaintiff in his said capacity of agent. On demurrer:—*Held*, that the parties contracted with reference to the then existing partnership business, and that the contract was to employ the plaintiff for a period of four years and a half, subject to the condition that all parties so long lived. Per *Channell*, B., and *Wilde*, B. *Martin*, B., dubitante.

Quære, whether the case falls within the principle of those cases in which, the personal skill of the party being involved, the contract was put an end to by death.

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said Emanuel Bentley, now deceased, and the defendant should pay all the expences of carrying and shipping stone at certain places called Brighthouse, Brookfoot or Halifax, and also the expenses of carriage to the railway station at Lightcliffe or Halifax, and should furnish the plaintiff with invoices for all stone shipped or trucked by them as soon as it was sent off: that the said Emanuel Bentley, now deceased, and the defendant should balance all business transactions with the plaintiff, and pay over the amount due to him for commission, on the 16th of June and the 16th of December in each year. And it was further stipulated and agreed that the said agreement should be held binding without reference to any legal technicalities.—Averments: that the plaintiff has done and performed all matters and things on his part to have been done and performed in order to entitle him to the due performance of the said agreement on the part of the said defendant, and all reasonable times have elapsed in that behalf.—Breach: that the defendant has failed and made default in the performance of the said contract on his part, and did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half from the date of the said agreement; and did not nor would execute certain orders for stone procured by the plaintiff in his said capacity as agent as aforesaid; and did not nor would furnish the plaintiff with invoices for all stone shipped or trucked as soon as it was sent off; and did not nor would balance all business transactions on the 16th of June and the 16th of December in each year, or at any other time, but therein made default and broke the said contract and agreement on his part, whereby the plaintiff was and is greatly damaged and injured.

Demurrer and joinder therein.

Cleasby argued, in support of the demurrer, in Hilary Term (Jan. 25).—The declaration is bad on the ground that it shews no breach of contract. The agreement was made by the plaintiff with the defendant and his partner, and upon the death of the latter it terminated. [*Martin*, B.—Assuming that the defendant was under no obligation to carry on the business after the death of his partner, still, if he shipped stone sold by the plaintiff, would he not be bound to render him an account of it?] That might be evidence of a new implied agreement with the plaintiff. By the death of one partner the contract of partnership is ipso facto dissolved: Gow on Partnership, p. 219, 3rd ed., *Vulliamy v. Noble* (a). The partnership being at an end, the surviving partner was under no obligation to carry on the business for the purpose of fulfilling the contract. [*Martin*, B.—If a firm consisting of many partners hires a clerk for a year, and any one of the partners dies, is the contract at an end?] In the case of ordinary servants the servant is discharged by the death of the master: Williams on Executors, p. 727, 5th ed. [*Martin*, B.—The wages are paid for a year's service; therefore if the servant does not serve for a year he is entitled to nothing; then suppose the master died on the 364th day of the service, is the servant to get nothing? *Wilde*, B., referred to *Jackson v. Bridge* (b).] This subject was incidentally discussed in *Siboni v. Kirkman* (c), where *Parke*, B., in the course of the argument, said, "Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death: that is this, that they are not liable in those cases where personal skill or taste is required." If the contract is not of a personal nature, to be performed by

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(a) 3 Meriv. 614.

(b) 12 Mod. 650.

(c) 1 M. & W. 418. 423.

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the testator only, the executor may enforce it: *Marshall v. Broadhurst* (a); and he is bound to perform it: *Wentworth v. Cock* (b). Here the contract was to do certain business which the act of God has rendered it impossible to perform. In order to ascertain whether the defendant is liable, it is necessary to see whether the contract was of such a nature that the obligation on the part of the plaintiff to perform it has ceased. Now, the plaintiff was not bound as London agent to any one but the partnership firm. He was under no obligation to act for either of the partners separately. The death of one partner might render the agency of little or no value, while his being alive might have formed part of the consideration for accepting the service. [*Wilde, B.*—The strong argument in the defendant's favour is, that the plaintiff was to be paid according to the amount of business done. A man may be willing to undertake an agency, knowing the quantity of business transacted by a partnership firm, but it may not be worth his while to be agent for a single individual. *Martin, B.*—The plaintiff agreed to act as the sole London agent of the copartnership for a period of four years and a half; then does the death of one partner relieve him from that obligation? Arguing upon principle, I should say it does not, because the act of God does not discharge a person from the performance of his contract.] There is nothing in the agreement from which it can be inferred that the contract is to be performed if one partner dies. [*Channell, B.*—The general rule is, that where a contract is personal an executor may sue for a breach of it in his testator's lifetime, the exception being a contract to marry, which is of such an extremely personal nature that an executor cannot sue for a breach of it unless there is some special damage to the testator's estate.] This agreement was entered into with reference to the existing

(a) 1 C. & J. 403.

(b) 10 A. & E. 42.

partnership, and it was never intended that it should be in force after the partnership was at an end. [*Martin, B.*—Suppose a person contracts with three partners to serve them for four years, and at the end of six months they dissolve partnership, are they relieved from their contract?] There the partnership is put an end to by the act of the partners themselves.

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Simon, in support of the declaration.—This is an absolute contract to serve for a period of four years and a half, and may be enforced notwithstanding the death of one partner. The law is thus stated in *Gow on Partnership*, p. 358:—"The right of action must necessarily survive . . . So with respect to joint contracts entered into by a firm, and from which a joint legal responsibility results, it can at law, after the death of one partner, be enforced against the survivor alone, and finally against the representatives of the last survivor; for the law considers partnership contracts, which are joint in form, as producing only a joint obligation, which on the death of one attaches exclusively upon the survivor." The defendant was bound to continue the employment of the plaintiff, and the plaintiff was bound to continue his services until the expiration of the four years. The defendant is liable as surviving partner, and he is entitled to contribution from the estate of his deceased partner. It makes no difference that the contract was with the partnership firm. In declaring against a surviving partner it is not necessary to notice the deceased partner: *Chitty on Pleading*, vol. 1, p. 58, 7th ed. And if, in this case, no mention had been made of the partnership or death of the one partner, the defendant could not have pleaded that he was in partnership with another person, and that the contract was determined by his death. In *Dobbin v. Foster (a)* the

(a) 1 Car. & K. 323.

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plaintiff was engaged by three partners as their foreman for twelve years. Before that period elapsed one partner retired, and the plaintiff continued in the service of the two others, who, having become bankrupts, dismissed him. *Coltman, J.*, ruled that the plaintiff might sue the three partners on the original agreement.

Cleasby replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

CHANNELL, B.—This was a case upon demurrer, argued before my brothers *Martin, Wilde* and myself. The question that arises is on the construction of the contract set forth in the declaration.

In the argument it was suggested that the case fell within the principle of those cases in which, the personal skill of the parties being involved, the contract was put an end to by his death. It may be so: we express no opinion upon that. Our judgment is founded upon a different ground. And upon a ground which arises anterior to the question whether the executor of the deceased party is liable for the performance of the contract.

We mean the question, "What *did* the parties contract should be done?"

The meaning of the contract itself is one question—the parties against whom it may be enforced is another.

Now the contract in this case is sued upon as a contract that the surviving defendant would employ the plaintiff as agent in the business he might carry on by himself after the death of his partner. And accordingly the breach stated in the declaration is that the defendant (alone) did not employ the plaintiff "as his sole agent," &c.

It is not that the defendant failed to employ the plaintiff as the agent of the "firm,"—treating the contract as an absolute agreement on the part of the defendant that the firm should last for four years and employ the plaintiff during that time, but that the defendant failed either to carry on business separately after the other party's death, or, carrying on business, failed to employ the plaintiff.

Probably the latter was intended, though there is no distinct averment that the defendant did ship any stone, or do any business, after the death of his partner.

Such being the breach, we are of opinion that the declaration is bad on the ground that there was no such contract.

We think the contract had reference to a certain existing partnership business only.

Any business carried on after the death of one partner might be a totally different one. It might be much smaller and less lucrative to the plaintiff. And he might well object to act as agent for a much more limited concern at the rate of remuneration for which he was content to serve the original firm.

And as we find no mention in the contract of any other than the partnership business; as we see no trace of the parties having looked to or contemplated any other, we conclude that they were contracting only in reference to the partnership business, and that consequently there is nothing to bind the parties on either side to an agency for any other than such business.

This is sufficient to dispose of the case. But as an amendment in the declaration by extending the breach to the non-employment of the plaintiff in the *partnership* business for the full term of four years would raise the broader question, whether the defendant had contracted absolutely for the continuance of the partnership, we think it right to give our opinion upon that point also.

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After fully considering the contract and the probable intention of the parties, to be collected from the various terms of the agreement, we come to the conclusion that the contract was intended to be for a period of four years and a half, subject to the condition that *all the parties so long lived*.

We do not believe, on reading the contract, that the parties contemplated the continuance of the agency by the executor after the death of the agent, or by the surviving partner after the death of either member of the firm.

We think the agreement of the parties had relation to the existing state of things, which they presumed would continue for four years, and in reference to which presumption alone they contracted.

We are somewhat fortified in this view by the case of *Beswick v. Swindells* (a), in which the Court of error, affirming the judgment of the Court below, so regarded the intention of the parties upon an analogous, though not similar, undertaking.

We are therefore of opinion that judgment should be entered for the defendant.

My brother *Martin* does not entirely concur in this judgment, which is to be taken as the judgment of my brother *Wilde* and myself.

Judgment for defendant.

(a) 3 A. & E. 868. 882.

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JOHN HENRY HUTCHINSON v. BARROW.

Feb. 25.

THIS was an action of ejectment to recover possession of a close called the "Townend Close," containing two acres and twenty perches, situate at Welham, in the parish of Claborough, in the county of Nottingham. By consent of the parties, and order of a Judge, the following case was stated for the opinion of this Court, without pleadings.—Henry Clarke Hutchinson, of Welham aforesaid, by his will bearing date the 10th April, 1854, and duly executed to pass real estate, gave and devised as follows:—

"I give and devise—All that my messuage or dwelling-house, with the buildings and lands belonging thereto, now occupied by me, situate at Welham aforesaid (containing about twenty acres), together with the close of land called the Hall Close (containing about fourteen acres and a half), now occupied by Edward Wright as tenant thereof, and also the three cottages and garden cottage at Welham aforesaid (except as to the cottage now occupied by my servant Francis Brown, being one of the above three cottages)

In April 1854 a testator devised as follows:—"I give and devise all that my messuage or dwelling-house with the buildings and lands belonging thereto now occupied by me, situate at W. (containing about twenty acres), together with the close of land called the Hall Close (containing about fourteen acres and a half), now occupied by E. W. as tenant thereof, and also the three cottages and garden cottage at W. aforesaid (except as to the

cottage now occupied by my servant F. B., being one of the above three cottages) with the orchard and piece of ground behind and adjoining thereto, containing about one acre and a half, which I hereby give and devise to the said F. B. and to S. his wife successively during their lives after the decease of my wife M. H. and subject to such estates for life, unto and to the use of my said wife, her heirs and assigns for ever." Previous to the year 1847 a close, called "Townend Close," consisting of about six acres, formed part of a farm belonging to the testator at W. In the year 1847 a railway was commenced, which was completed before the will was made, and which divided the Townend Close, separating a part containing 2 a. 0 r. 26 p. (which was claimed in this action), and another piece, called "The Potato Patch," containing 2 r. 35 p., from the remainder of the old Townend Close. After the formation of the railway and before the making of the will the testator took the Potato Patch into his own occupation, and continued to hold it until his death in June 1856. In the Spring of 1856, he took the close in question into his occupation and continued to hold it until his death, but up to this time it had been occupied by a tenant with the rest of the farm.—*Held*: First, that the word "now" had reference to the date of the will, and that the Townend Close in question would not pass under it independently of the 7 Wm. 4 & 1 Vict. c. 26.

Secondly, that there was a manifest intention that the will should not speak and take effect from the death of the testator, and consequently the close in question did not pass under the 20th section of the 7 Wm. 4 & 1 Vict. c. 26.

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with the orchard and piece of ground behind and adjoining thereto, containing about one acre and a half, which I hereby give and devise to the said Francis Brown and to Sarah his wife, successively, during their lives after the decease of my wife Mary Billyard Hutchinson, and subject to such estates for life, unto and to the use of my said wife, her heirs and assigns for ever."

After a bequest of personalty to his wife, the testator by his said will devised and bequeathed all other his real and personal estate whatsoever and wheresoever to trustees, their heirs, executors, administrators and assigns: upon trust as to his said real estate for his wife for life, with remainder (except as to an estate called Bolham) to the use (subject to certain annuities) of the plaintiff, his heirs and assigns for ever.

The testator died on the 4th of June, 1856, without having revoked or altered his said will.

Mary Billyard Hutchinson, the wife of the testator, survived her husband, and by a codicil to her will, duly executed for passing real estate, gave and devised the said close, called the "Townend Close," to the defendant, his heirs and assigns for ever.

The wife of the said testator had no right or title to dispose of the said close called the "Townend Close" by her will, unless the same passed to her under the said will of her husband by the devise to her in fee.

At the date and time of the execution of his said will, and from thence until and at the time of his death, the said Henry Clarke Hutchinson was the owner of the messuage or dwelling-house, buildings, cottages and lands situate at Welham aforesaid, which are delineated on the plan which accompanies and is to form part of this case, and containing the quantities particularized on the plan. At the time of his death he was in the occupation of all the particulars



delineated on the plan, except the Hall Close, the cottage marked *A* and the 26 perches of land adjoining, the cottage marked *B* and the 32 perches of land adjoining, and the cottage marked *C*.

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At the date and time of the execution of his said will he was in the occupation of the same particulars, except the Townend Close in dispute. This close, containing 2 acres and 20 perches, and the Potato Patch adjoining, containing 2 roods and 35 perches, were, previously to the year 1847, part of a close called Townend Close, containing 6 acres or thereabouts, which formed part of a farm belonging to the testator at Welham aforesaid.

In the year 1847 the Manchester, Sheffield and Lincolnshire Railway was laid out, and soon afterwards constructed. It was completed before the testator made his will. This railway cut in two the old Townend Close, leaving one portion, consisting of the Potato Patch and the Townend Close in dispute, on one side of the railway. The said Henry Clarke Hutchinson, on the formation of the railway, and before the date or execution of his will, took the Potato Patch into his own occupation, and continued in the occupation thereof until the time of his death; but the Townend Close in dispute continued to be occupied, with the rest of the said farm, by a tenant of the testator down to the Spring of the year 1856, when the testator took the said close into his own occupation, and from that time until and at the time of his death he continued to occupy the said close with the said other premises so in his occupation as aforesaid.

The railway runs on a high embankment, and there can be no road to the Potato Patch except through the Townend Close in dispute or the land devised by the said testator's will to the said Francis Brown and his wife, successively, during their lives.

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The testator occupied the Potato Patch by means of a gravelled cart road, shewn on the plan accompanying this case, leading from the turnpike road, at the point marked *D* on the said plan, past the said Francis Brown's house to the point marked *E*, and thence at right angles over the grass to the point marked *F*. The testator never occupied the Potato Patch by a road over the Townend Close, but always by the road above described. When the testator took the Townend Close into his occupation he had a gate opened into it at the point marked *F* on the said plan, and occupied that close by the same road as the Potato Patch.

Before and at the date and time of the execution of his said will, and from thence until and at the time of his death, the said testator was seised in his demesne as of fee (amongst other hereditaments and premises) of the said close called the Townend Close, and the said other hereditaments and premises hereinbefore mentioned.

The question for the opinion of the Court is, whether the said close called the Townend Close, containing 2 a. 0 r. 20 p., passed under the said will of Henry Clarke Hutchinson by the devise in fee to his said wife.

If the Court shall be of opinion that it did, then judgment is to be entered for the defendant, with costs of suit. If the Court shall be of opinion that it did not, then judgment is to be entered for the plaintiff, with costs of suit.

Kemplay argued for the plaintiff in Hilary Term (Jan. 21). —The question is, whether the Townend Close passed by the testator's will to his wife in fee; if not, she had no power to devise it. The 24th section of the 7 Wm. 4 & 1 Vict. c. 26 enacts "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed im-

mediately before the death of the testator, unless a contrary intention shall appear by the will." That section must be viewed in connection with the third, which enables a testator to dispose of all the real and personal estate to which he may be entitled at the time of his death. If the will in question had been made prior to the 7 Wm. 4 & 1 Vict. c. 26, it is clear that the Townend Close would not have passed under it. At the date of the will the testator occupied the Potato Patch, and the Townend Close was in the occupation of a tenant. *Doe d. Parkin v. Parkin (a)*, *Doe d. Renow v. Ashley (b)* and *The Attorney General v. Bury (c)* are authorities that the word "now" in a will means at the time of its execution. Then has the 7 Wm. 4 & 1 Vict. c. 26 made any difference in this respect? It is submitted that it has not, because the will shews a clear intention that the Townend Close should not pass, for there is a specific bequest of the lands belonging to the testator's dwelling-house and then in his occupation. No doubt, by the combined effect of the 3rd and 24th sections, a general devise of real estate will operate on all property of that description to which the testator may happen to be entitled at his decease; but it is different with a specific bequest. In that case the true rule of construction is, first, to see what the words of the will comprise, and then to transfer its operation to the property of the testator as it existed at his death: Jarman on Wills, vol. 1, pp. 270, 271, 2nd ed. That construction was put upon the statute by Sir *J. Knight Bruce*, V. C., in *Emuss v. Smith (d)*, and is warranted by the observations of Sir *W. P. Wood* in *Douglas v. Douglas (e)*. No doubt, where the gift is general in its terms, it will pass all property which belonged to the testator at his death:

(a) 5 Taunt. 321.

(b) 10 Q. B. 663.

(c) Eq. Cas. Abr. 201.

(d) 2 De Gex & S. 722.

(e) 1 Kay, 405.

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Doe d. York v. Walker (a); but where the bequest is specific the established rules of construction are not affected by the 7 Wm. 4 & 1 Vict. c. 26. Thus, in *Cole v. Scott* (b), the testator, by his will, dated the 29th April, 1843, after a devise of "the house in which I *now* reside," and also devising "the residue and remainder of my messuages &c. whereof I am *now* seised or possessed," bequeathed all such manors, farms, &c., as well freehold as copyhold and leasehold, as are *now* vested in me, or, as to the said leasehold premises, as shall be vested in me at the time of my death as a trustee or mortgagee;" and it was held that a freehold estate purchased by the testator after the date of his will did not pass. That decision was affirmed, on appeal (c), by Lord *Cottenham*, C., who, in delivering judgment, said: "The question is whether, in the terms the testator has used, he has not used the word 'now' with reference to the time he was making his will. I think it quite clear that he has. I find this will with a date to it, shewing therefore the period when it was executed, and I find that in it the testator gives 'all the estates of which I am *now* seised or possessed.' The word 'now' has no meaning in itself, and if there is no date by which to construe it, some period must be fixed upon to which it can refer. Here, however, the date does appear, and the word *now* can only have reference to the time specified in the will, that time being the date of the will, namely, the 29th of April, 1843. It appears, therefore, to me just the same as if the testator had said 'all the freehold and leasehold estates of which I am on this 29th of April, 1843, seised and entitled.' If those had been the words, of course there could not have been a doubt; but the words used are, in effect, the same. What is the difference whether the date is repeated, or

(a) 12 M. & W. 591.

(b) 16 Sim. 259.

(c) 1 M'N. & G. 518. 528.

whether the word *now* shews that the date is referred to?" So, here, the testator manifestly used the word "now" with reference to the date of the will, and it shews his intention that the will shall not take effect as if executed immediately before his death. *Hepburn v. Skirving* (a) is also an authority in support of this view.

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Field, for the defendant.—First, the Townend Close would pass under this devise independently of the 7 Wm. 4 & 1 Vict. c. 26. The testator at the date of his will occupied the Potato Patch, which formed a portion of the old Townend Close, which was dissevered by the railway. The testator intended to devise all the land formerly belonging to the Potato Patch. The words "now occupied by me" may be rejected as a *falsa demonstratio*.—Secondly, the Townend Close passes under the will by virtue of the 7 Wm. 4 & 1 Vict. c. 26. The question is one of construction, and no sufficient intention appears by the will that it shall not speak and take effect as if executed immediately before the death of the testator. The word "now" does not shew such an intention. In using the words "lands now occupied by me," the testator meant no more than "lands which I occupy or possess." After-acquired land would have passed under that devise. [*Martin*, B.—Suppose a testator devised to his wife "all the land in my occupation," and afterwards let to a tenant from year to year, a farm which he then had in hand, would the wife lose that farm? *Channell*, B.—Suppose a devise of "all my farm and the three fields belonging thereto and occupied therewith," and that after the date of the will the testator purchased a fourth field which he occupied with the farm, would that field pass? *Pollock*, C. B.—If a testator had a mansion surrounded by land on which cottages were built,

(a) 4 Jur. N. S. 651.

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and he devised "all that land now in my occupation," would the cottages pass?] They would, unless a contrary intention appeared from other parts of the will. *Cole v. Scott* (a) is distinguishable, because there the devise was, "all such manors, farms, &c., as well freehold as copyhold and leasehold, as are now vested in me, or, as to the said leasehold premises, as shall be vested in me at the time of my death;" the latter words clearly shewing that the testator used the word "now" with reference to the date of his will. In *Douglas v. Douglas* (b), Sir W. P. Wood, V. C., in his judgment, said: "In *Doe d. York v. Walker* (c) the gift was of 'all the estates of which I am seised in the parish of Bowden,' and that case in fact determined that, where a testator describes property 'of which I am seised,' that is nothing more than the expression 'all my estates;' and unless there is something definite, as in *Cole v. Scott* (a), to shew that the testator intended to refer to property in his possession at the date of the will, such a gift would pass everything which answered the general description at the death of the testator." In *Hepburn v. Skirving* (d), Sir J. Stuart, V. C., observed that the language of Lord Cottenham, in *Cole v. Scott*, "as to the force and effect of the words 'now seised,' and particularly as to the word 'now,' seems consistent with the decision in *Doe v. Walker* (c), as it amounts to this—that if it appears from the context that the testator manifestly uses the words 'now seised' with reference to the date of making and of executing his will, there is sufficient evidence of his intention that his will should not, as to the estates so described, speak as if it had been executed immediately before his death." Here the testator has not manifestly used the word "now" with reference to the date of his will.

(a) 1 Mac. & G. 518.

(b) 1 Kay, 400.

(c) 12 M. & W. 591.

(d) 4 Jur. N. S. 651.

Kemplay, in reply, referred to *Doe d. Parkin v. Parkin* (a) and *O'Toole v. Browne* (b).

Cur. adv. vult.

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The judgment of the Court was now delivered by

MARTIN, B.—The question in this case is, whether a close, called the 'Townend Close, containing 2 a. 0 r. 20 p. passed under the will of Henry Clark Hutchinson by a devise in fee to his wife.

Previous to the year 1847 a close, called *Townend Close*, consisting of about *six* acres, formed part of a farm belonging to the testator at Welham in Nottinghamshire. In the year 1847 a railway was commenced, which was completed before the will was made, which cut through the 'Townend Close separating *the part in dispute* and another *piece called the Potato Patch*, containing 0 a. 2 r. 35 p. from the remainder of the old Townend Close. These two closes are coloured pink and green on the plan which accompanies the case. After the formation of the railway, and *before the making of his will, the testator took the Potato Patch into his own occupation and continued to hold it until his death.* The date of the will is the 10th of April, 1854. In the *Spring of 1856 he took the close in question into his occupation* and continued to hold it until his death, but up to this time it had been in the occupation of a *tenant of the testator*, and had been occupied by him with the rest of the farm before mentioned. At the time of the making his will the testator occupied the messuage, dwelling-house, buildings and lands shewn on the plan, south-east of the railway and west of the turnpike road, except the *Townend Close* now in question. All the land there situated measures 23 a. 0 r. 11 p. Excluding the close in ques-

(a) 5 Taunt. 321.

(b) 3 E. & B. 572.

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tion, the land measures 20 a. 3 r. 31 p.; and excluding the close in question and the Potato Patch it measures 20 a. 0 r. 36 p. The road used by the testator to the Potato Patch is shewn on the plan marked yellow; and after he took the close in question into his own occupation in the *Spring* of 1856, he used the same road to enter this close at the gate *F*.

The testator died on the 4th June, 1856. The words of the devise are as follows:—"I give and devise all that my messuage or dwelling-house, with the buildings and lands belonging thereto, now occupied by me, situate at Welham aforesaid (containing about twenty acres), together with the close of land called The Hall Close (containing about fourteen acres and a half), now occupied by Edward Wright as tenant thereof, and also the three cottages and garden cottage at Welham aforesaid (except as to the cottage now occupied by my servant Francis Brown, being one of the above three cottages, with the orchard and piece of ground behind and adjoining thereto, containing about one acre and a half, which I hereby give and devise to the said Francis Brown and to Sarah his wife successively during their lives, after the decease of my wife Mary Billyard Hutchinson and subject to such estates for life) unto and to the use of my said wife, her heirs and assigns for ever."

It was contended on behalf of the defendant, first, that the close in question passed to the testator's wife, upon the true construction of the devise, independent of the Statute of Wills, 7 Wm. 4 & 1 Vict. c. 26, and if not, then, secondly, that it passed by virtue of that statute.

We think it clear that the first proposition cannot be maintained. The lands to pass by the devise are lands belonging to the messuage or dwelling-house with the buildings "*now*" (which before the statute undoubtedly meant at the time of the making the will) occupied by the

testator. The close in question answers no part of this description. It did not belong to the messuage or dwelling-house and buildings of the testator, it belonged to the farm of the tenant who was then in the occupation and possession of it. Nor was it occupied by the testator.

Secondly, it was contended that by virtue of the 24th section of the statute it passed to the testator's wife. That section enacts that every will shall be so construed, with reference to both real and personal estate, to speak and take effect as if it had been executed *immediately before the death of the testator unless a contrary intention shall appear by the will*. In our opinion a contrary intention does appear by this will. We think it was the intention of the testator, as expressed in this devise, to state his will to be, that the lands to be taken by his wife were as described by the then existing state of circumstances, and that the word "*now*" merely expresses the date as if he had said, "*On the 10th of April, 1854.*"

In Jarman on Wills, vol. 1, p. 261, to which we were referred in the argument, the operation of the statute is discussed with great learning and ability. There is a case there referred to, *Cole v. Scott* (a), in which "*now*" is considered by Lord Chancellor Cottenham to mean the date of the will, and on considering the words of *this* will it is to us clear that "*now*" is to be read as if, instead thereof, the testator had put the *actual date*, and we think there is nothing in the will which will enable us to add the property in dispute to the house which is undoubtedly the subject of the devise.

Judgment for the plaintiff.

(a) 16 Sim. 259; 1 Mac. & G. 518.

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In ejectment the plaintiff proved that S. was the tenant of the premises when he became the owner, and had paid rent to him for many years; that she quitted and was succeeded by H.; that N. succeeded H. and paid rent. In the beginning of September 1858, the defendant and N. severally called on the plaintiff and asked if he would accept the defendant as tenant. On each occasion the plaintiff said he would. On the 7th of September the defendant took possession, and in October of the same year paid the rent to Michaelmas 1858, for which the plaintiff gave a receipt as for rent due

from N. The plaintiff received the rent at Christmas 1858, and gave a receipt for it to the defendant as for rent due from him. In March, 1859, the plaintiff gave to the defendant notice to quit at Michaelmas or otherwise at the end of the year of the tenancy which should expire after the end of one half year from the time of his being served with that notice. On the 17th of December, 1859, the plaintiff's agent served a notice on the defendant to quit at Midsummer. The defendant said the plaintiff might have the house if he paid the valuation of the fixtures and goodwill.—*Held*, that it was a question for the jury, and not for the Judge, to be determined by a consideration of all the facts, at what time the tenancy commenced; that there was evidence of a tenancy ending at Michaelmas, and that it was a misdirection to withdraw from the jury all the facts, except the conduct of the defendant when the notice to quit at Midsummer was served on him. *Martin*, B., dissentiente.

THIS was an action of ejectment to recover possession of a public house called "The Shovel."

At the trial, before *Martin*, B., at the Middlesex sittings in Michaelmas Term, the plaintiff proved that one Mary Staples was tenant of "The Shovel" at the time when he became owner of it, and had paid rent to him for fifteen or sixteen years. One Humphreys succeeded her. Newman succeeded Humphreys, and paid rent to the plaintiff. About the end of September, 1858, the defendant called on the plaintiff and asked the plaintiff if he would accept him as tenant. The plaintiff said he had no objection. Newman afterwards called on the plaintiff and asked him if he would take the defendant as tenant. The plaintiff said he would, at the same rent which Newman had given. On the 7th of September the defendant took possession of the premises. On the 19th of October the plaintiff received from the defendant a quarter's rent, due at Michaelmas, and gave a receipt for it as for rent due from Newman. The plaintiff received the rent due at Christmas, 1858, and gave the defendant a receipt for it. On the 24th of March, 1859, the plaintiff gave the defendant notice to quit at Michaelmas, 1859, "provided your tenancy originally commenced at that time of the year, or otherwise &c. at

the end of the year of your tenancy which shall expire after the end of one half year from the time of your being served with this notice." The plaintiff, however, continued to receive rent until Midsummer, 1860. One Richards, a witness, proved that on the 17th of December, 1859, he served a notice, signed by the plaintiff, requiring the defendant to quit the premises at Midsummer, 1860, when the defendant said that the plaintiff might have the house if he paid him the valuation of the fixtures and goodwill. The defendant and his witnesses proved that the defendant had paid about 300*l.* to Newman for the goodwill and fixtures, and that he told the plaintiff of this arrangement and asked him for an agreement for a term of years. The plaintiff would not grant a lease, but told the defendant that if he paid his rent regularly he would not disturb him during his life. At the conclusion of the defendant's case his counsel insisted that the tenancy was shewn to have begun at Michaelmas, 1858, or a few days before.

The learned Judge told the jury that the case depended on the evidence of Richards; that there was nothing to shake it in any way; and that the only question was whether the jury, from the defendant's conversation with Richards, would infer that the tenancy began at Midsummer. The jury having found a verdict for the plaintiff,

Huddleston, in Hilary Term (Jan. 12), obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury in telling them that the case depended only on the evidence of Richards, and that there was nothing in the defendant's evidence to alter that, and that there was evidence to shew that the tenancy expired at Michaelmas.

Day shewed cause in the same Term (Jan. 24).—The

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only material evidence was that on the 17th of December the plaintiff gave the defendant notice to quit the premises at Midsummer. The defendant said, in effect, "I will go out if Mr. Walker pays me the money I paid to Newman." This was evidence which the jury might treat as an admission that the tenancy had been determined by the notice: *Doe d. Baker v. Woombwell* (a). [Wilde, B.—The rule was not granted on the ground that the language of the defendant when served with the notice was not evidence to that effect. *Martin*, B., referred to *Doe d. Clarges v. Forster* (b).]

Huddleston, in support of the rule.—Where a tenant from year to year quits the premises in the middle of a quarter, and another comes in, if the incoming tenant pays the rent up to quarter day, the rule is that the tenancy is considered to commence from the day up to which he pays the rent: *Doe d. Holcomb v. Johnson* (c). Upon that principle, the defendant's tenancy must be taken to have commenced at Michaelmas, and therefore not to have been duly determined by a notice to quit expiring at Midsummer. Though the defendant may not have objected to the "insufficiency of the notice to quit at the time he received it, his omission to do so did not preclude him from objecting to its insufficiency at the trial: *Oakapple d. Green v. Copous* (d). It was a question of fact, which should have been left to the jury, whether there was a new taking when Newman gave up possession and the defendant came in.

Cur. adv. vult.

The learned Judges differing in opinion, the following judgments were now delivered.

(a) 2 Camp. 559.
 (b) 13 East, 405.

(c) 6 Esp. 10.
 (d) 4 T. R. 361.

WILDE, B.—I am of opinion that this rule must be made absolute. And I wish to state clearly, at the outset, that I do not decide the case upon any determination of law, or opinion of my own, as to when the tenancy in question began or ended, but simply upon the ground that the time at which the tenancy began was a question for the jury and not for the Judge, and ought to have been left to them with all the evidence which bore upon it.

The question then is, whether the learned Judge who tried the cause was justified in withdrawing from the consideration of the jury all the facts of the case except the conduct of the defendant when the notice to quit at Midsummer was served on him.

The propriety of so doing must be determined by considering what was the issue to be tried, and whether the evidence withdrawn had any tendency to prove or disprove it. The plaintiff was bound to make out a Midsummer tenancy. The defendant denied a Midsummer tenancy and suggested a Michaelmas tenancy; and the question to be tried by the jury was, what was the agreement between the parties as to the nature of the tenancy and the time at which it should commence.

The evidence withdrawn wholly from the consideration of the jury consisted: First, of the account given by the plaintiff, by the defendant, and by Newman—that is, by all three of the parties concerned—as to what passed between them when the defendant was accepted as tenant.

Secondly, of two receipts for rent, the first of which treated Newman as tenant up to Michaelmas, and the second of which treated the defendant as tenant after that time.

Thirdly, of a notice to quit given by the plaintiff to expire at Michaelmas, thus treating the tenancy as terminating at that period.

Now I think it is impossible to say that none of these

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facts had any tendency to shew what the agreement was to which the parties had come. I do not say they established a Michaelmas tenancy, but I feel assured that they should have been submitted to the jury as a portion of the facts from which they might collect what the real agreement had been. They were clearly fit to be contrasted with the defendant's conduct when served with the notice, which formed the very slight and only evidence of a Midsummer holding. It was indeed argued that the defendant's tenancy was only a continuation of Newman's, which had been a continuation of the tenancy of those who had occupied before him.

This does not avail the plaintiff, for several reasons. First, whether there was this continuous tenancy or not was a question for the jury, and the above evidence should equally have been left to them upon that question. Secondly, there was no evidence at all beyond the expression "succeeded" that the several occupiers did continue the same holding in the manner suggested, and the meaning of that expression by the parties who used it was also for the jury, if there was anything in it. And, thirdly, there was not a particle of evidence to shew when the tenancy of Newman or any of the preceding occupiers had commenced, and consequently none to shew when such a tenancy terminated. For these reasons I think the mode in which the question was left to the jury was erroneous, and there must be a new trial.

BRAMWELL, B.—I think this rule should be made absolute. The question is whether there was any evidence that the year of the defendant's tenancy did not end at Michaelmas. If there was it ought to have been left to the jury. I think there was such evidence. Mrs. Staples had been tenant to the plaintiff of the premises in question from year to year. She was succeeded by Humphreys. He was succeeded by

Newman. When the year of any of these tenancies would have expired was not shewn. During the quarter ending Michaelmas 1858, the defendant succeeded Newman and occupied the premises. Before or after the quarter day at Michaelmas, (which is immaterial and a little uncertain, though I think it was clearly before,) the defendant applied to the plaintiff to take him as tenant and the plaintiff agreed to do so. The defendant arranged with Newman, and entered and continued to occupy. He paid the plaintiff the rent due at Michaelmas, having received it in part from Newman, and took a receipt from the plaintiff as for rent due from Newman. The subsequent rent he paid, and took receipts for it in his own name. The plaintiff gave the defendant six months' notice to quit at Midsummer 1860. Now what took place when the defendant entered may have been an assignment of Newman's interest, invalid for not being under seal, or a surrender of Newman's interest and a new demise to defendant, valid according to *Nickells v. Atherstone* (a) and confirmed by *Davison v. Gent* (b), or invalid as far as relates to Newman's interest, but still a binding bargain between plaintiff and defendant that the defendant's tenancy to the plaintiff should begin and end at Michaelmas. If the evidence tended to prove any one of these things as much as any other it was worthless, because the tenancy of the former tenants may have been terminable at Midsummer. But I think it went to shew a new taking by the defendant of the plaintiff (valid at least as between them) from Michaelmas. It is much more convenient to suppose such a condition of things than a continuance of the preceding annual tenancy and an invalid assignment of it; (and see *Buckworth v. Simpson* (c), per *Parke, B.*): Therefore I think there was evidence of a tenancy ending at Michaelmas and not at Midsummer.

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(a) 10 Q. B. 944.

(b) 1 H. & N. 744.

(c) 5 Tyr. 344. 354; S. C. 1 C. M. & R. 834.

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MARTIN, B.—I regret the difference of opinion which exists in this case, because I fear the judgment of the majority of the Court will create a new source of litigation in very many cases and a question for the jury, which would frequently be a temptation rather to decide upon feeling and prejudice than on reason and truth, a matter always to be regretted and if possible avoided. The question upon which I have the misfortune to differ from my brother *Bramwell* is, whether there was evidence which ought to have been submitted to the jury, that there was a new demise by the plaintiff to the defendant of the public house in question commencing at Michaelmas 1858. He thinks there was. I think there was not.

The facts were these:—Many years ago a public house had been demised from year to year at a rack rent, and there was no evidence except what was derived from the conduct of the defendant when he was served with the notice to quit as to the time of the commencement of the original tenancy. About twenty years ago a Mrs. Staples was in the occupation of it. She continued tenant for fifteen or sixteen years, and was succeeded by a person called Humphreys. A person called Newman succeeded him, and was the tenant in occupation in 1858. In the Autumn of that year, (and I agree with my brother *Bramwell* that the great probability is that it was before Michaelmas Day, indeed before the 7th of September,) the defendant called upon the plaintiff and asked him if he would accept him (the defendant) as tenant; the plaintiff said he had no objection. Some time afterwards Newman called upon the plaintiff and asked him if he would accept the defendant as tenant at the same rent, and the plaintiff said he would. On the 7th of September the plaintiff entered into possession. On the 19th of October the plaintiff went to the house for his Michaelmas rent; he had taken with him a receipt filled up. The defendant paid the rent, and the plaintiff gave him a receipt in

the name of Newman, and refused to give a written agreement or lease. In point of fact Newman had supplied the funds for paying the rent up to the 7th of September, and the defendant paid for the subsequent period of the quarter. Some time after Christmas the plaintiff called for the rent then due, which the defendant paid, and the plaintiff gave him a receipt in his own name. In March, 1859, the plaintiff served the defendant with a notice to quit on the 29th September then next, "provided the tenancy originally commenced at that time of the year or otherwise at the end of the tenancy which should expire next after the end of one half year from the time of the service of the notice." The plaintiff received the rent for Christmas 1859, and gave a second notice to quit at Michaelmas 1860. Upon the evidence of what passed at the time of the service of this notice, in accordance with *Doe d. Clarges v. Forster (a)* and *Doe d. Baker v. Woombwell (b)*, and other cases, I left the question to the jury whether the original tenancy had commenced at Midsummer; they found it had, and the verdict was entered for the plaintiff.

I thought then, and continue to think, that there was no other question for the jury in the cause. There were four occasions, and four only, upon which anything occurred between the parties. The first was on the agreement by the plaintiff to accept the defendant as tenant in the place or instead of Newman, and in my opinion this was the agreement or contract which, upon the defendant entering into possession, created the new tenancy. I will state hereafter what I consider this contract to have been; for the present it is sufficient to say that there was no evidence from what then occurred of a new tenancy to commence at Michaelmas 1858. The second occasion was on the 19th October, when the Michaelmas rent was paid. I think nothing then occurred or was supposed by either party to

(a) 13 East, 405.

(b) 2 Campb. 559.

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have occurred to make a new contract or create a new tenancy. The third occasion was when the plaintiff received the Christmas rent. Nothing then passed except the payment of the rent and giving a receipt in the defendant's name, and no presumption can arise from it, for all which had occurred previously was known. The fourth occasion was the service of the notice to quit in March 1859, which was in the form given in the law books when the commencement of the tenancy is unknown, and affords no evidence upon the point in question. As I have already said, I consider the rights of the parties to depend upon what occurred when the plaintiff assented to the proposals of Newman and the defendant to accept the latter as tenant. It seems to me plain upon the evidence that neither of them intended to make, or ever supposed they had made, any contract afterwards. What then occurred was what happens in innumerable instances. A tenant from year to year agrees with another to sell him his interest, and goodwill, and they go to the landlord and ask him to accept the new man as his tenant, to which he agrees. This and nothing more was what occurred in the present instance, and it is the ordinary transaction. The new man afterwards enters into possession. There is generally a valuation, as was here, and the old tenant is debited in it with an apportionment of the rent from the preceding quarter day to the day of his leaving. Afterwards the landlord or tenant, as the case may be, is desirous to determine the tenancy and to give a notice to quit; and the question is, what period upon the above facts is to be deemed as the commencement of the new tenancy for the purpose of this notice? It perhaps would have been better when the Courts of law introduced the tenancy from year to year to have determined that a half year's notice to quit, ending upon any day on which rent was payable, would have been sufficient; but it has been

long settled that the notice must be to quit at the end of the year from the day of the year when the tenancy commenced. There are two periods which, as it seems to me, may with some reason be contended as the true period, one the commencement of the original tenancy; the other the day of the new tenant entering into possession, which in this case was the 7th of September; for my own part I cannot see the ground for supposing it to be the next ensuing quarter day. *I think the substance of the transaction is a proposal by the old tenant and the proposed new tenant to the landlord, that the latter should accept the proposed new tenant in the place of or instead of the old one, that is, to substitute him in lieu of the old one, and that he should be in the same position as to the tenancy,—which would comprehend its duration, including the time of its commencement, the rent and all other terms. This I think is the real and true contract arising upon or to be implied from the transaction, and it is eminently convenient that it should be so.* The commencement of the original tenancy is generally known, and in the great majority of instances is upon a quarter day—the day when the new tenant enters into possession is probably wholly unknown to the landlord, it is quite as frequently in the middle of a quarter as at the end of one: and if the landlord were required by law to give a notice to quit, as upon a day ending the day of the year next before that upon which the new tenant entered into possession, in the great majority of instances he would be required to do a thing which would be to him impossible; and as in very many instances the day of entry is not a rent day, another extreme inconvenience would arise, that the tenancy would end on a day in the middle of a quarter, which at the best would lead to an apportionment of the rent, but most probably to the loss altogether to the landlord of the rent from the preceding quarter day. *The point in differ-*

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ence between my brother Bramwell and myself is as to the contract arising from the circumstances proved. The cases of *Nihells v. Atherstone* (a) and *Deviss v. Gent* (b) have no bearing upon it. The judgment of Baron Parke also, in *Backworth v. Simpson* (c), has no direct bearing one way or the other; but I should collect that his general view on the subject concurs with mine.

For these reasons I cannot concur with my brother Bramwell that there was evidence to be submitted to the jury that there was a tenancy commencing at Michaelmas, 1858.

I differ from my brother Wilde upon two points.—First, I think, upon the undisputed evidence in the cause, it was matter of law and for the Judge to lay down, that the notice to quit was to be given with reference to the commencement of the original tenancy. Secondly, upon the question of fact, viz., whether the tenancy did commence at Midsummer, I think all the evidence bearing upon it was submitted to the jury, and that the other evidence referred to was irrelevant, and, instead of having a tendency to aid them in arriving at a true conclusion, had a tendency to mislead them.

Rule absolute.

(a) 10 Q. B. 944.

(b) 1 H. & N. 744.

(c) 5 Tyr. 344, 354; S. C. 1 C. M. & R. 334.

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IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

BARKWORTH and Others, Assignees of the Estate and
Effects of HARRISON and Others, Bankrupts, v.
ELLERMAN.

Feb. 4.

THIS was an appeal from the decision of the Court of Exchequer in refusing (a) to grant a rule to shew cause why a nonsuit should not be set aside and a verdict entered for the plaintiffs for 1621*l.* 17*s.* 10*d.*, pursuant to leave reserved at the trial.

The first count of the declaration stated that the bankrupts, before they became bankrupt and at the time of the making of the several contracts hereinafter in this declaration mentioned, carried on the business of bankers at Hull under the firm of Harrison, Watson and Co., and Price, Marryat and Co. carried on the business of bankers in London, and were the London agents of Harrison, Watson and Co.; and the defendant was a customer of Harrison, Watson and Co., and kept a banking account with them

The defendant, a merchant at Hull, kept an account with the Hull bank, upon the terms that they should procure P. and Co., their London agent, to accept on their credit bills drawn by the foreign correspondents of the defendant against their consignments to him, and of which P. and Co. were advised by the Hull bank. The defendant paid the

Hull bank a quarter per cent. on the amount of the acceptances, and they paid P. and Co. a fixed annual sum for transacting their London business. When a bill was accepted by P. and Co., the Hull bank debited the defendant with the amount, and they charged him interest from the time the bill was due. The Hull bank became bankrupt, and P. and Co. paid all bills accepted by them which were due after the bankruptcy.—*Held*, in the Exchequer Chamber (reversing the decision of the Court of Exchequer), that the assignees of the Hull bank, and not P. and Co., were entitled to recover from the defendant the amount of such bills.

(a) Easter Term, May 5, 1859. they would give their reasons on Not reported, the Court on refusing the rule having stated that a subsequent day, but none were given.

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at Hull; and thereupon, in consideration that Harrison, Watson and Co., at the request of the defendant, would procure Price, Marryat and Co., on the credit of them, Harrison, Watson and Co., to accept a bill of exchange dated the 9th day of July A.D. 1857, and drawn by Enoch, Ernst and Heineman upon Price, Marryat and Co. for the sum of 68*l.* 4*s.* 7*d.*, payable three months after the date thereof to Enoch, Ernst and Heineman or their order, the defendant promised Harrison, Watson and Co. that when the said bill became due he, the defendant, would pay to Harrison, Watson and Co. the amount of the said bill, and would also pay to them a certain commission, to wit, a commission of a quarter per cent. on the amount of the said bill.—Averments: that Harrison, Watson and Co. did, before they became bankrupt, confiding in the said promise of the defendant, procure Price, Marryat and Co. to accept the said bill of exchange on the credit of them, Harrison, Watson and Co., and that afterwards, and after Harrison, Watson and Co. became bankrupt, the said bill became due and was duly paid by Price, Marryat and Co.; of all which the defendant afterwards had notice, and was requested by them, the plaintiffs, as assignees as aforesaid, to pay to them the amount of the said bill and the said commission; and a reasonable time for the defendant to have made such payment had at the commencement of this suit elapsed: Yet the defendant has not paid the amount of the said bill or the commission, but has wholly refused so to do.—Then followed seven similar counts relating to other bills.

Pleas, to first count.—First: non assumpsit.

Secondly.—That Harrison, Watson and Co. did not procure Price, Marryat and Co. to accept the bill of exchange on the credit of Harrison, Watson and Co., as alleged.

Thirdly.—That the promise of the defendant was not broken, as alleged.

Fourthly.—That the bill of exchange was not by Harrison, Watson and Co. procured to be accepted by Price, Marryat and Co. on the sole credit of Harrison, Watson and Co., but the said bill was by Harrison, Watson and Co. procured to be accepted by Price, Marryat and Co. for the accommodation of the defendant, and on the credit and for the account of the defendant as well as on the credit of Harrison, Watson and Co., and so that the defendant should become, and became and was, liable to be called on and compelled by Price, Marryat and Co. to repay them the whole or such part of the amount of the said bill as should remain unpaid to them. And the defendant says that, after the said bill had become due and had been paid by Price, Marryat and Co., and whilst the whole amount thereof remained due and wholly unpaid to them, Price, Marryat and Co. called on and compelled the defendant to pay to them the amount of the said bill so remaining unpaid to them as aforesaid. And the defendant says that, before the bankruptcy of Harrison, Watson and Co., he, the defendant, satisfied and discharged the commission in the first count mentioned by payment.

There were similar pleas to the other counts, and issue was taken on all the pleas.

The cause was tried before *Pollock*, C. B., at the London sittings after Hilary Term, 1859, when the following evidence was given on the part of the plaintiffs.

On the 24th of September, 1857, a petition for adjudication of bankruptcy was filed in the Court of Bankruptcy for the Leeds district against Harrison, Watson and Co., and they were, on the 30th September, 1857, adjudicated bankrupt, and the plaintiffs appointed assignees of their estate and effects. The bankrupts had previously carried on business at Kingston upon Hull as bankers, and Price, Marryat and Co. were their London correspondents or

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agents. Before Harrison, Watson and Co. became bankrupt the several bills in the declaration mentioned had been accepted by Price, Marryat and Co. The bill mentioned in the first count was as follows:—

“ 12 Oct^r.

“ Enoch, Ernst and Heineman.”

“ Hamburg, 9 July 1857. £68. 4. 7. Sterl^s.

“ At three months after date pay this first of exchange, second not paid, to the order of ourselves, (530)
 Sixty-eight pounds four shillings seven pence Sterl^s.
 value in ourselves, which place to account J. E. & Co.,
 to wait advice from Hull.

“ Acc^d Price & Co.

“ Enoch, Ernst & Heinemann.

“ To Sir Chas. Price & Co.,

“ London.

“ o/a J. E. & Co. (a)

“ Hull.

“ No. 6,936.”

All the bills became due after the bankruptcy, and were paid when due by Sir Charles Price and Co. It was admitted that the balance due to the plaintiffs, if entitled to recover the amount of the bills paid by Sir Charles Price and Co., was 1621*l*. 17*s*. 10*d*.

The examination of Ellerman, the defendant, before the Bankruptcy Commissioner, was given in evidence, and was (in substance) as follows:—

“ I am a merchant at Hull, and have been so for eighteen years past. I kept a banking account with the bankrupts, which I opened about 1845. Our agreement was, if I overdraw my account in cash I was to be charged 5*l*. per cent. interest, and was to be allowed 3*l*. per cent. for any

(a) These words (meaning “on account of J. Ellerman and Co.”) were written on the bill by Price and Co.

money I might have from time to time to the credit of my account. I was to pay the bankrupts a quarter per cent. commission on the entire account, and if I did any business in London I was to pay them an additional quarter per cent. During the transaction of my business it frequently became necessary that my foreign correspondents should draw on Sir Charles Price and Co. for any consignments made to me by such foreign correspondents. On hearing from my foreign correspondents that they had made consignments to me and drawn on Sir Charles Price and Co. against such consignments, I requested the bankrupts to instruct Sir Charles Price and Co. to accept such drafts. My instructions were, I believe, always in writing. In some cases, at the commencement of my business, and in fact throughout my transactions with the bankrupts, I paid the bankrupts money to cover such drafts. The bills of lading of the cargoes in respect of which the bills were drawn were sent to me direct, my correspondents being chiefly my personal friends. It was my invariable rule to request the bankrupts to instruct Price and Co. to accept such drafts. I do not remember in any instance having requested Sir Charles Price and Co. to accept bills on my account, except, I believe, I once wrote to them when at Hamburgh, saying, if a certain bill was presented to them for acceptance and they had not received instructions from Harrison, Watson and Co. to accept, if they would please hold it over for a day until they received instructions from the bankrupts. I am not aware I ever had any other communication with Sir Charles Price and Co. until the suspension of payment by the bankrupts, nor to the best of my belief did I ever receive any communication from Sir Charles Price and Co. on the subject of any bills so accepted, except through my bankers, the bankrupts. The bills I requested the bankrupts to instruct Sir Charles

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Price and Co. to accept were invariably placed by the bankrupts to the debit of my account with them. On these bills I paid the bankrupts an extra quarter per cent. commission, or one half per cent. in the whole. I continued to bank with the bankrupts up to the 24th September, 1857, when they suspended payment. The account made up since the bankruptcy of Harrison, Watson and Co. shewed a balance against me of 1621*l*. 17*s*. 10*d*. I do not still owe that money. I have paid it to Sir Charles Price and Co., they having claimed it and given me a bond of indemnity for so doing. I have received a letter from Sir Charles Price and Co., dated the 30th September, 1857, of which the following is a copy :—

“Messrs. J. Ellerman & Co. “3 King William St.
 “Gentn. “30th Sept. 1857.

“In consequence of the lamented stoppage of our mutual friends Messrs. Harrison, Watson & Co., we consider it our duty to hand you the annexed statement of drafts which by their directions we have accepted on your behalf, and for the due retirement of which at maturity we shall feel obliged if you will make the necessary provision here.

“We are, &c.,

“Price, Marryat & Co.”

(Then followed a statement of the drafts, which included the bill drawn by Enoch Ernst and Heineman, on the 9th July, 1857).

“Henry Pease was examined on the part of the plaintiffs, and said:—I was a member of the late firm of Harrison, Watson & Co. I was a banker at Hull for many years. Sir Charles Price & Co. were our London correspondents. For many years past the defendant had an account with us. He was in the habit of requesting our firm to instruct our London correspondents, Sir Charles Price & Co., to accept bills drawn by his foreign correspondents. That practice con-

tinued for many years. The charge we made the defendant for obtaining these acceptances was an extra 5*s.* per cent. We charged him 5*s.* per cent. on his general account. On all acceptances that were accepted by Price & Co. there was 5*s.* extra; that is, half a per cent., a quarter per cent. on the general account, and an extra quarter per cent. on the acceptances of Sir Charles Price & Co.: that was added to the defendant's account every year, and was known by him and paid by him. We paid Sir Charles Price & Co. a fixed sum of 600*l.* a year for doing business, and then there were extra charges for foreign postage, and so on. Sir Charles Price & Co. did not charge us anything extra for giving these acceptances. It has happened that a bill was drawn upon them for a larger amount than we had advised them to accept, and they would inform us that a bill was drawn for such and such an amount and would request to know whether they might accept it or not, and then we advised them. They never accepted bills without our advice on our account: if they did it was at their own risk. I never knew Sir Charles Price & Co. have any dealings with the defendant except through ourselves. We debited the defendant with the acceptances of Sir C. Price in his account with us at the time the bills were accepted, and at the same time Sir Charles Price & Co. were credited in our books with the amount. When the last of these bills was accepted by Sir Charles Price & Co., I have no doubt that our account was in credit with their firm; I mean in credit with respect of cash, not acceptances. I have no doubt that our credit account was not overdrawn. There were bills running to a much greater amount than the cash account would pay. The bills accepted by Sir Charles Price & Co. for the defendant did not pass through our hands till they were returned paid: they came to us at the end of the month as vouchers for the amount that Sir Charles Price &

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Co. had paid. As to the correspondence between the defendant's correspondents and Sir Charles Price & Co., we sometimes had advice from Price & Co. that such and such a person had drawn, but beyond that we knew nothing about them." Cross-examined.—"The bills was debited to the defendant the day they were accepted. Interest was charged of course from the day they became due. It is not unusual to debit a customer with a bill on the day on which it is accepted. We debit him with it on the day it is accepted. We become answerable as soon as it is accepted; we do not make it an item on which to charge interest except from the day on which it becomes due. The date is entered in the book when it is due. Although debited in the book it is debited as a bill, but it is not cash until it becomes due. It is cash so far as this, that we are answerable the day it is accepted." (Looking at the pass-book). "This is the way in which it is debited. There is a bill drawn, 'Mare & Co.:' draft on Price & Co., 11th September, at three months, due December 14, for 510*l*. The interest is carried to his debit at the end of the year, and is calculated from the day on which the bill becomes due, and it is then made cash in our books."—The case then set out a great deal of correspondence between the parties with respect to these and other bills. After the bankruptcy, Harrison, Watson & Co. wrote to Sir Charles Price & Co. as follows:—

"Gentlemen,

"Hull, 16th Nov. 1857.

"We shall be obliged by your sending us a list of all the drafts accepted by you, falling due after the 23rd Sept., on our account.

"We are, &c.,

"Harrison, Watson & Co."

To which the following answer was returned.

"Messrs. Harrison, Watson & Co.

"Gentlemen,

"London, 17th Nov. 1857.

"In reply to your favor of the 16th instant, we beg to inform you that on the 10th ultimo we forwarded a statement of the drafts accepted on your account, distinguishing those drawn by yourselves from those which we had accepted on behalf of your friends.

"We are, &c.,

"Price, Marryat & Co."

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On this evidence the Lord Chief Baron directed a nonsuit, but reserved leave to the plaintiffs to move to enter a verdict for 1621*l.* 17*s.* 10*d.*, if the Court should be of opinion that they were entitled to recover.

The question for the opinion of the Court is, ought the Court of Exchequer to have granted a rule pursuant to the leave reserved and to have made the rule absolute?

J. Brown (*Crompton Hutton* with him) now moved for a rule to shew cause (*a*) why the nonsuit should not be set aside and a verdict entered for the plaintiffs for 1621*l.* 17*s.* 10*d.* The plaintiffs are entitled to recover the amount claimed. The defendant, a merchant at Hull, received from his correspondents abroad goods for which he paid by the acceptances of Price & Co. bankers in London. The defendant had no direct communication with Price & Co., but he got Harrison, Watson & Co., his bankers at Hull, to procure their acceptances. For this accommodation the defendant paid Harrison, Watson & Co. a quarter per cent. on the amount of the bills, in addition to the ordinary per centage paid to a banker by his customer; and Harrison, Watson & Co. paid Price & Co. 600*l.* a year for accepting and paying their bills. In 1857, Harrison, Watson & Co. became

(*a*) Before *Wightman, J., Williams, J., Willes, J., Byles, J., Crompton, J., Keating, J., and Hill, J.*

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bankrupt, and Price & Co. paid the bills which they had accepted on account of the defendant. The money so paid is a debt due from the bankrupts to Price & Co. and which they might prove under the bankruptcy, and also a debt due from the defendant to the bankrupts. The defendant, instead of paying the plaintiffs, the assignees, has paid Price & Co., under an indemnity, not the full amount of the bills, but the amount due on his account with the bankrupts. [*Wightman, J.*—When Price & Co. paid the bills, could they have sued the defendant on the ground that they accepted the bills on his account?] There was no privity between the defendant and Price & Co.; but only between the defendant and the bankrupts, and the bankrupts and Price & Co. These were in no sense accommodation bills. The defendant, instead of getting the acceptance of his banker, gets the acceptance of a London banker procured by his banker. The defendant in effect says, “If you, the Hull bank, will get your London agent to accept my bills I will pay you the amount.” That is not a contract of indemnity. Immediately a bill was accepted by Price & Co., it was debited by the Hull bank to the defendant in his account, but the interest was not charged until the bill became due. [*Crompton, J.*—Price & Co. were bound to accept in consideration of the 600*l.* a year paid to them by Harrison, Watson & Co. The transaction was the means by which Harrison, Watson & Co. supplied the defendants with money.] In no instance did the defendant send money to Price & Co. to meet the bills.

Per CURIAM.—You are entitled to a rule to shew cause.

Lush (*Price* with him) shewed cause.—This is only a contract by the defendant to indemnify the Hull bank against any loss resulting from these bills, which are accommodation

bills; and inasmuch as the bankrupts' estate has suffered no loss, the plaintiffs are not entitled to recover. The Hull bank were the defendant's agent to procure the acceptance of Price & Co. [*Williams, J.*—You must establish that the bankrupts had a double character, viz., as agents for the defendant and also responsible to Price & Co. *Wightman, J.*—Who was liable to pay Price & Co. when they paid the bills?] They might have maintained an action against the defendant on an implied promise to indemnify them. The plaintiffs do not claim nominal damages only; therefore the question is, whether they are entitled to recover from the defendant the full amount of these bills which the Hull bank has never paid. The contract is this—if you, the Hull bank, will get your London agent to accept bills for me, I will indemnify you against any loss. There is no evidence of an absolute contract by the defendant, that if the Hull bank would procure their London agent to accept bills for him he would pay the Hull bank the amount of the bills when they became due. Suppose the defendant had gone into the market and purchased the bills, if the contract is that contended for by the plaintiffs the defendant would have to pay their amount twice over. [*Byles, J.*—Would not the amount of the bills appear on the debit side of the defendant's account with the Hull bank. If so, was not the contract that the defendant would pay the Hull bank when they paid the amount of the bills? *Wightman, J.*—Assuming that the defendant had not paid any one, who could have sued him?] Price & Co. might have claimed against the Hull bank, and, if they paid, they might have sued the defendant on an implied contract of indemnity. If the defendant had paid the Hull bank before they paid Price & Co., he would have made a payment which he was under no obligation to make. Suppose the defendant had changed his banker, and had agreed to indemnify Price & Co. when

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the bills become due, what claim could the Hull bank have had against him?] If the other side is right, the plaintiffs would be entitled to recover even though the defendant had paid Price & Co., or had taken up the bills. [*Williams, J.*—If the defendant is only liable to indemnify the Hull bank, he will have had the whole value of the bills and paid no one. Suppose the contract had been in writing in these terms:—"I, the defendant, agree with you, the Hull bank, that if you will procure your London agent to accept bills drawn by my correspondent I will hold you harmless against any loss." Then, suppose that Price & Co. had only received from the Hull bank one penny in the pound, could the plaintiffs have recovered more from the defendant?] Assuming that the contract was to pay the Hull bank, it would only continue in force so long as all parties remained in statu quo. There was a privity between Price & Co. and the defendants, for every bill has the words, "which place to account of Ellerman & Co." Price & Co. received their instructions from the Hull bank as agent for the defendant. The defendant would have had no defence to an action by Price & Co. for the amount of the bills. [*Crompton, J.*—There is not the slightest privity between Price & Co. and the defendant. The consideration for the acceptance is the money paid to Price & Co. by the Hull bank.]

J. Brown was not called upon to support the rule.

WIGHTMAN, J.—We are all agreed that our judgment must be for the plaintiffs. The evidence does not satisfy us, and ought not to have satisfied a jury, that there was any privity between Price & Co. and the defendant. The transaction was between the defendant and the Hull bank, who were to procure their London agent to accept the bills; and when they were accepted and paid it was, so far as the defend-

ant was concerned, on the credit given to him by the Hull bank, not by their London agent. Price & Co., in writing to Harrison, Watson & Co., after the bankruptcy, say, "We forward a statement of the drafts accepted *on your account*," and in truth the acceptance of the drafts was on account of the Hull bank. In that view it seems to us that the plaintiffs, the assignees of Harrison, Watson & Co., have a right to maintain this action.

Rule absolute accordingly.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

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Feb. 5.

ERROR on a bill of exceptions.—The declaration stated that the plaintiff, on the 18th June, 1859, at the request of the defendant, bargained with the defendant to sell and sold to him, and the defendant then agreed to buy and bought of the plaintiff, 250 shares in a certain mine and mining association, called and known by the name of "The Wheal Charlotte Mine," in the parish of Pellamethnoe, in the county of Cornwall, at and for the price of 2*l.* 5*s.* per share, the whole price of the said 250 shares amounting to a large sum of money, to wit, 562*l.* 10*s.*; the said shares to be delivered to the defendant and paid for by him, one half in two months and the other half in four months from the day and year aforesaid; and in consideration thereof, and that

Upon the sale, by one broker to another, of shares in a mine, they respectively signed bought and sold notes, the former of which was as follows:—
 "Bought, T. F. 250/5120ths shares in Wheal Charlotte, at 2*l.* 5*s.* per share, 562*l.* 10*s.*, for payment, half in two months, and half in four months. In an action for not accepting the shares:—*Held*, that evidence was admissible of a custom among brokers in mining shares, that, in contracts relating to the sale and purchase of such shares, the delivery takes place at the time appointed for payment.

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the plaintiff at the request of the defendant, had then promised the defendant to deliver to him the said shares as aforesaid, the defendant then promised the plaintiff to accept and receive the same of and from the plaintiff, and then to pay the plaintiff for the same in the manner in that behalf aforesaid. And the plaintiff says that although the said period of two months from the day and year aforesaid had elapsed before the commencement of this suit, and he, the plaintiff, within that period, was ready and willing to deliver the said shares to the defendant on the said terms and according to the said agreement, and although he, the plaintiff, did all things necessary on his part to entitle him to have the same accepted by the defendant on the terms aforesaid, and the time for so accepting the same has elapsed, yet the defendant made default in accepting the same and in paying the price thereof, according to the terms and true intent and meaning of the said agreement, and the plaintiff hath thereby incurred expense and sustained loss in keeping the said shares and in re-selling the same.

Pleas (inter alia).—First, non-assumpsit. Secondly: that the plaintiff was not ready or willing to deliver the said shares as alleged.—Issues thereon.

At the trial, before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1859, the plaintiff gave in evidence the bought and sold notes. The bought note, which was signed by the defendant, was as follows:—

“4, Cushion Court, Old Broad St., London.

“June 18, 1859.

“Bought, Thomas Field, Esqr., 250/5120ths shares in Wheal Charlotte, at 2*l.* 5*s.* per share, 562*l.* 10*s.* 0*d.* (Five hundred and sixty-two pounds ten shillings), for payment half in two and half in four months.

“William Lelean.”

(The case then set out the sold note which was in the same terms).

The plaintiff further proved that the Wheal Charlotte Mine was a mine conducted on the cost-book principle, and that the defendant and the plaintiff were both of them brokers in mining shares. The counsel for the plaintiff further offered to prove, by parol evidence, a usage or custom among brokers in mining shares that, in contracts relating to the sale and purchase of such shares as the contract above mentioned, the delivery of the shares takes place concurrently with and at the time agreed upon between the vendor and purchaser for the payment for the shares to the vendor by the purchaser; and that the purchaser cannot demand to have the said shares delivered to him by the vendor before the time of payment for the shares agreed upon between the vendor and the purchaser. Whereupon the counsel for the defendant submitted that the evidence as to the usage or custom so offered to be given to the plaintiff was not good or admissible in law upon the said first and second issues or either of them, and that the said issues ought to be found for the defendant.

The Lord Chief Baron thereupon held and affirmed that the evidence as to the usage or custom, so offered to be given by the plaintiff as aforesaid, was not good or admissible in law. Whereupon the jury found a verdict for the defendant. The counsel for the plaintiff having tendered a bill of exceptions to the above ruling, the case was argued in Trinity Vacation, 1860 (a), by

Montague Smith (*Coleridge* with him), for the plaintiff.—The contract being silent as to the time for the delivery of the shares, evidence of the custom was admissible for the purpose of shewing that the delivery and payment were to be cotemporaneous. [*Willes*, J.—In some cases the pay-

(a) June 19. Before *Wight-* J., *Willes*, J., *Byles*, J., *Black-*
man, J., *Williams*, J., *Crompton*, *burn*, J., and *Keating*, J.

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ment is made before the shares are delivered.] As a general rule evidence of usage is admissible where it merely seeks to add an incident to the contract, but does not control, nor is inconsistent with it. This custom is not inconsistent with the contract, and to incorporate it is merely to carry out the intention of the parties. [*Wightman*, J.—Suppose there was no evidence of usage, when would the shares be deliverable?] Within a reasonable time. It is difficult to reconcile all the cases on this subject. [*Blackburn*, J.—You must contend that *Spartali v. Benecke* (a) was wrongly decided.] The judgment of the Court in that case proceeded on the ground that the usage would, in effect, advance the time of payment stated in the contract, and was therefore inconsistent with it. The error in that case lies in supposing that evidence of usage is only admissible when the contract is ambiguous in its terms. In *Brown v. Byrne* (b), the bill of lading expressly stated the rate of freight payable, yet it was held that evidence was admissible of a custom by which the shipowner, on payment, was bound to allow three months' discount. The principle on which the doctrine proceeds is, that the parties must be taken to have contracted with reference to the custom or usage. There are two branches of the rule: one relates to the language used, and evidence is admissible to explain its mercantile or trade meaning; the other has reference to known usages which prevail as to the subject-matter of certain contracts, and in that case such incidents may be annexed, provided they are not repugnant to, or inconsistent with the written contract. The French law agrees with our own in annexing incidents to contracts. [*Willes*, J., referred to *Toullier*, de Droit Civil, vol. 6, chap. 3, sect. 5, p. 304, 314, 319. *Wightman*, J.—*Syers v. Jonas* (c) is an

(a) 10 C. B. 212.

(b) 3 E. & B. 703.

(c) 2 Exch. 111.

express authority that where the contract is silent evidence is admissible, not merely to explain the terms used, but to annex customary incidents. *Blackburn, J.*—That doctrine was affirmed in *Humfrey v. Dale (a)*.] In *Parker v. Ibbetson (b)* evidence was admitted to prove that, by the custom of a particular trade, a yearly hiring was determinable by a month's notice at any time; and it was left to the jury to say, first, whether such a custom existed; and secondly, whether the contract was made with reference to the custom. The jury found that the custom was proved, but that the hiring was a special hiring, to which the custom did not apply. [*Wightman, J.*—In the judgment in *Spartali v. Benecke (c)*, there is a mistake with reference to *Syers v. Jonas (d)*: it is said, "the evidence was *received*, upon the ground that the incident sought to be annexed was not inconsistent with the contract;" but the evidence was *rejected*. Perhaps it means, "the evidence was held to be admissible, upon the ground," &c.] In *Lucas v. Bristow (e)*, the plaintiffs sold to the defendant "fifty tons best palm oil," expected to arrive, &c., at 40*l.* 10*s.* per ton: wet, dirty, and inferior oil, if any, at a fair allowance." The oil, on arrival, contained only one-fifth of the "best" oil; and, in an action for not accepting it, it was held that evidence was admissible to shew that, according to mercantile usage, the contract was satisfied if the oil delivered contained a substantial portion of "best" oil; and that such evidence was for the jury. [*Wightman, J.*—In that case there was an uncertainty on the face of the contract. Wet, dirty, and inferior oil was to be taken at an allowance, and it was uncertain how much of the "best," and how much wet, dirty, and inferior oil would be in each cargo. Therefore

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(a) 7 E. & B. 266.

(b) 4 C. B., N. S. 346.

(c) 10 C. B. 212. 226.

(d) 2 Exch. 111.

(e) E. B. & E. 907.

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there was ambiguity enough to admit evidence of what proportion of good and inferior oil would satisfy the contract.] In *Humfrey v. Dale* (a) evidence was admitted of a custom in the oil trade, that when a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. Lord Campbell, C. J., in delivering the judgment of the Court, said:—"Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument." [Blackburn, J.—The difficulty is to tell how much omission in a written contract will make the incident repugnant or inconsistent with it. Byles, J.—The word "silent," which is used in some of the cases, is an equivocal word: it may mean not expressed but implied; or it may mean neither expressed nor implied.] In the case of *The Schooner Reeside* (b), Story, J., said:—"The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. . . . But a written, and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow

(a) 7 E. & B. 266. 274.

(b) 2 Sumner. Rep. Circ. Ct. U. S. 569.

mere presumptions and implications properly arising, in the absence of any positive expression of intention, to control, vary or contradict the most formal and deliberate written declarations of the parties." [*Blackburn, J.*, referred to 1 Smith's Lead. Cas. p. 462.] In the case of the hiring of a domestic servant, the incident is annexed of "a month's warning or a month's wages." [*Blackburn, J.*—A contract to hold from Lady Day in Northumberland, and the like contract in Cornwall, though in the same terms, might operate very differently if the custom in either county was applied to them.] In *Spartali v. Benecke* (a), the contract was for the sale of specific goods at an agreed price to be paid on a future day, and therefore the Court considered that the vendor did not mean to retain his lien. [*Keating, J.*—The usage there set up contradicted the terms of the contract as to the time of payment. *Williams, J.*—I understand the Court to say that *Syers v. Jonas* laid down the general law, but they decided the case of *Spartali v. Benecke* on its particular merits. There the contract was for specific goods; here the contract would be satisfied by the delivery of any shares in that mine.]

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Mathew, for the defendant.—There is a distinction between a contract which is silent and a contract which, by its language, impliedly excludes a particular usage or custom. This contract is not silent, and, according to its true construction, the shares are to be delivered within a reasonable time, and to be paid for at the times mentioned. The delivery and payment are not to be contemporaneous. The rule is positive, that evidence is inadmissible to contradict the express terms of a contract or its implied meaning: 1 Smith's Lead. Cas. 462. The law on this subject was laid down in *Hutton v. Warren* (b), and

(a) 10 C. B. 212.

(b) 1 M. & W. 466.

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adopted in *Spartali v. Benecke* (a). [*Blackburn, J.*—Evidence of usage is never adduced for the purpose of annexing an incident to a contract, unless in order to vary it. According to the rule as sometimes laid down, evidence of usage would never be admissible except when it was not wanted.] In a marine policy of insurance there is an implied warranty of seaworthiness, and evidence would be inadmissible to contradict it. So, in the case of a demise of land, evidence could not be given that by local usage the lessor was precluded from distraining for rent. *Spartali v. Benecke* did not turn on the fact that the contract was for the sale of specific goods: whether the goods are specified or unascertained makes no difference. That decision proceeded on the ground that the usage was inconsistent with the contract, since its effect would be to give the vendor a lien on the goods, when by the terms of the contract he had waived it. In *Ford v. Yates* (b), where the contract imported a sale for ready money, it was held that evidence was inadmissible to shew that, by the usual course of dealing between the parties, the goods were sold on a credit of six months. [*Blackburn, J.*—That was not the case of a custom of trade, but merely of the terms of dealing between two individuals.] A long course of dealing between several persons is equivalent to a custom. *Wightman, J.*—Suppose, in this case, for a long course of dealing the payment had always been contemporaneous with the delivery, would evidence of that have been admissible?] In *Brown v. Byrne* (c) and *Lucas v. Bristow* (d) the evidence was admitted, under the other branch of the rule, to explain an ambiguity in the language of the contract, not to annex an incident to it. In *Parker v. Ibbetson* (e) the contract was made in a particular trade, and therefore, ac-

(a) 10 C. B. 202.

(b) 2 Man. & G. 549.

(c) 3 E. & B. 703.

(d) E. B. & E. 907.

(e) 4 C. B., N. S. 346.

ording to the ordinary rule, all customs which regulated that trade were tacitly incorporated into the contract, unless excluded. Upon the face of this contract credit is expressly given to the vendee, but by implication no credit is to be given if this custom is admissible. If the contract had contained no mention of payment, by implication of law the vendor would have had a lien on the shares, but the introduction of the stipulation as to the time of payment destroys the right of lien: *How v. Kirchner* (a), *Kirchner v. Venns* (b). Stipulations implied by law from the language of a written instrument are as binding as the express terms of the instrument, and as incapable of being controlled by custom; and it is clear that an express stipulation will exclude a custom: *Roberts v. Barker* (c). [*Williams, J.*—The ground of that decision is that the parties, having made an express stipulation, did not mean to be governed by the custom. Here the custom must be considered as included in the contract, not as an independent matter.] *Webb v. Plummer* (d) is another instance of a custom being excluded by the terms of the instrument. [*Williams, J.*—This question has arisen in cases where the contract is required to be in writing; then, if this custom is introduced as part of the contract, how is the contract in writing? *Blackburn, J.*—That point was considered by the Court of Exchequer Chamber in *Dale v. Humfrey* (e), and the majority of the Judges held that the custom was part of the written memorandum, though not expressed in it.] Also in *Clarke v. Royston* (f) the custom of the country was excluded by the terms of the contract.

Montague Smith, in reply, cited *Taylor v. Stray* (g).

The judgment of the Court was now delivered by

(a) 11 Moore, P. C. 21.

(b) 12 Moore, P. C. 361.

(c) 1 C. & M. 808.

(d) 2 B. & Ald. 746.

(e) E. B. & E. 1004.

(f) 13 M. & W. 752.

(g) 2 C. B., N. S. 175. 197.

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WIGHTMAN, J.—We are of opinion that in this case evidence of the custom was admissible. The plaintiff and the defendant were brokers in mining shares, and the bought and sold notes constituted the written contract between them. The sold note, of which the bought note is a copy, was, in terms, as follows:—"Sold, William Lelean, Esqr., 250/5120ths shares in Wheal Charlotte, at 2*l*. 5*s*. per share, 562*l*. 10*s*.; for payment, half in two and half in four months." The written contract, as proved by the bought and sold notes, provides expressly for the time for payment for the shares, but is wholly silent as to the time for the delivery of them; and, if nothing more appeared, the defendant would have been entitled to require the plaintiff to deliver them to him forthwith, or within a reasonable time, and before payment; but the plaintiff proposed to prove by parol evidence a custom amongst brokers in mining shares (of which the plaintiff and defendant must be presumed to be cognizant), that the vendor was not bound to deliver the shares without cotemporaneous payment; and the question is, whether such evidence was admissible in this case.

The Court of Common Pleas in the case of *Spartali v. Benccke* (a) mentions two instances in which evidence of usage is admissible in the case of written contracts; the first where, by usage, certain words are used in a mercantile contract in a sense differing from their ordinary meaning; and the second, where the usage annexes certain incidents to contracts upon which they are silent. It is said for the plaintiff that the present case falls within the second of these instances, the written contract being silent as to the time for delivery, though it specifies the time for payment, and the custom proposed to be annexed to the written contract would not alter the terms of it as expressed, nor be repugnant to or inconsistent with them. It was observed by

(a) 10 C. B. 212.

Lord *Campbell*, in the case of *Humfrey v. Dale* (a), that in a certain sense every material incident which is added to a written contract varies it, and makes it different from what it appeared to be, and so far is inconsistent with it; and if such variance were a ground of objection, it would be difficult in any case to introduce evidence of custom where there is a written contract.

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The judgment of the Court of Common Pleas in the case of *Spartali v. Benecke*, in which the circumstances were hardly distinguishable from the present, is no doubt directly against the admissibility of evidence of usage in this case; but that decision proceeds on what appears to me to be the mistaken ground, that the effect of the introduction of a custom as to the time of delivery of the thing sold would be to alter or vary the time fixed for *payment* by the written contract, whereas the time for payment would not be altered, and the custom would only affect the time for delivery, with respect to which the written contract is silent. The case of *Syers v. Jonas* (b) was cited in *Spartali v. Benecke*, and its authority not disputed as to the admissibility of evidence of custom to annex incidents to written contracts which are not expressly or impliedly excluded by the written terms. Several other cases to the same effect were cited upon the argument of this case, one of the latest being that of *Humfrey v. Dale* before referred to, in which the law upon this point is clearly laid down; and upon consideration of these authorities we are of opinion the evidence tendered ought to have been received, and that the plaintiff is entitled to judgment for a trial de novo.

WILLIAMS, J.—I agree with the judgment which has just been delivered by my brother *Wightman*. But I wish to add a few words as to the case of *Spartali v. Benecke* on which my

(a) 7 E. & B. 266.

(b) 2 Exch. 111.

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learned brother has made some comment. It may be observed that in that case, although the written instrument of sale was, *mutatis mutandis*, the same, substantially, as in the present, the usage relied on was different. In the present case, it is simply that the delivery is to take place at the appointed time for payment and not before. In *Spartali v. Benecke* the usage relied on was that delivery might, at the option of the buyer, be required at any time before the appointed day for payment, but in no case without present payment of the price. And therefore it was, I apprehend, that *Wilde, C. J.*, in his judgment treated the usage as varying the time for payment expressed in the statement of the contract, inasmuch as, according to that usage, the delivery intended by the contract might take place so as to give the seller a right to call for payment before the time specified for it in the written instrument. But according to the usage sought to be proved in the present case, no delivery can be required, or is intended to take place, before that time shall have arrived. If *Spartali v. Benecke* cannot be distinguished in this way, I agree in thinking that it ought to be overruled as being a misapplication of the principle on which the Court in that case, as in almost all the others on this subject, professed to act, viz., that evidence of commercial usage is admissible for the purpose of annexing incidents to contracts, unless it introduces something repugnant or inconsistent with the terms of the written instrument. In the present case I can find no such repugnancy or inconsistency, and therefore I think the evidence ought to have been admitted.

Judgment of trial *de novo*.


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MEMORANDA.

In the present Vacation Her Majesty, by letters patent, granted to *George Hayes*, Serjeant at Law, precedence at the Bar, next after *Archibald John Stephens*, Esquire, one of Her Majesty's Counsel.

In the same Vacation the following gentlemen were appointed Her Majesty's Counsel:—*William Dugmore*, of Lincoln's Inn, Esquire; *William Anthony Collins*, of Lincoln's Inn, Esquire; *Anthony Cleasby*, of the Inner Temple, Esquire; *Henry Warwick Cole*, of the Inner Temple, Esquire; *John Fraser Macqueen*, of Lincoln's Inn, Esquire; *Thomas Chambers*, of the Middle Temple, Esquire; *Edwin Plumer Price*, of the Inner Temple, Esquire; *Josiah William Smith*, of Lincoln's Inn, Esquire; *Richard Baggallay*, of Lincoln's Inn, Esquire; *Henry Mills*, of the Middle Temple, Esquire; The Honorable *Adolphus Frederick Octavius Liddell*, of the Inner Temple; *William Baliol Brett*, of Lincoln's Inn, Esquire; *John Burgess Karlake*, of the Middle Temple, Esquire; *William Digby Seymour*, of the Middle Temple, Esquire; *John Duke Coleridge*, of the Middle Temple, Esquire; The Honorable *George Denman*, of Lincoln's Inn, and *George Mellish*, of the Inner Temple, Esquire.

Thomas Wheeler, of the Middle Temple, Doctor of Laws, was called to the degree of the coif, and gave rings with the motto "non sine labore."



Exchequer Reports.

EASTER TERM, 24 VICT.

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April 25.

Fox and Another v. Nott.

The defendant shipped at Liverpool on board the plaintiffs' vessel certain goods, and the master signed a bill of lading which stated that the goods were shipped by the defendant "as agent," and were to be delivered at the port of Colombo "unto order or assigns, he or they paying freight for the goods." Before the shipment, the plaintiffs advanced to E., on whose account the goods were shipped, 400*l.*, upon an under-

ACTION for money payable by the defendant to the plaintiff for freight.

Plea.—That the freight claimed in the declaration is freight for the conveyance of goods in a ship called the "Eglantine," on the voyage mentioned in the bill of lading hereinafter mentioned, of which said ship, at the time of the shipment on board thereof of the said goods as hereinafter mentioned, one John Stewart was the master, and the plaintiffs were the charterers. And the defendant further saith that, before and at the time of the said shipment and of the signing and delivery to him of the said bill of lading as hereinafter mentioned, he carried on business, by and under the style of W. H. Nott and Company; and that he caused the said goods to be shipped on board the said ship, for the said voyage, for and on account of one J. Edwards, whose agent he then was in that behalf, and who, at the time of the said shipment, and from thence until the in-

taking by E. that he would indorse to them as a security a bill of lading of the goods, wherein the freight should be payable by E. in this country. The defendant indorsed the bill of lading to E., who indorsed it to the plaintiffs as a security for the said advance and a further advance made upon an estimate between the plaintiffs and E. of the value of the goods freight free. E. not having paid the freight:—*Held*, First, that the defendant was liable under the bill of lading to pay the freight to the plaintiffs.

Secondly, that the 18 & 19 Vict. c. 111, did not vest the property in the goods in the plaintiffs, as indorsees of the bill of lading, so as to deprive them of their right to sue the defendant for the freight.

indorsement to the plaintiffs of the said bill of lading as hereinafter mentioned, was the owner of the said goods; and that the said master, then being the agent in that behalf of the plaintiffs, received the said goods on board the said ship for and on behalf of the plaintiffs, to be carried by the plaintiffs on the said voyage, and on so receiving the same signed and delivered to the defendant a bill of lading for the said goods in the words and figures following, that is to say:—

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“Shipped in good order and condition by W. H. Nott & Co., as agents, in and upon the good ship or vessel called the “Eglantine,” whereof J. Stewart is master for this present voyage, now lying in the port of Liverpool, and bound for Colombo, Ceylon, four hundred and ninety-five bars, and three hundred and seventy-five bundles of iron, and nine hundred and fifty-four bundles of hoop iron, being marked and numbered as per margin, and are to be delivered in the like good order and condition

W.R.F. C//495 bars.

375 bdls.

954 bdls hoops,

Weighing 83 tons

@ 40s./

£166 0 0

Primage . . .

8 6 0

 £174 6 0

at the aforesaid port of Colombo (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order or to its assigns, he or they paying freight for the said goods here at the rate of forty shillings per ton of two hundred weight, with primage and average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading all of this tenor and date, one of which being accomplished the rest to stand void.

“Dated in Liverpool, this 4th day of May, 1860.

“Weight and contents unknown.

(Signed.)

“John Stewart.”

Of all which said premises the plaintiffs, at the time of the indorsement to them of the said bill of lading as hereinafter mentioned, had notice. And the defendant further saith

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that after he had received the said bill of lading as aforesaid he indorsed and delivered the same to the said J. Edwards : that before the shipment of the said goods as aforesaid, the plaintiffs then being the charterers of the said ship as aforesaid, did, at the request of the said J. Edwards, make to him an advance of 400*l.*, on the undertaking by the said J. Edwards, that he the said J. Edwards, being about to ship certain goods in the said ship, would indorse and make over to the plaintiffs a bill of lading for the said goods wherein the freight should be made payable in this country, and that the said freight should be paid by the said J. Edwards, and the said bill of lading should then be held by the plaintiffs as security for the said advance : that the shipment of the said goods in the said bill of lading mentioned was made at Liverpool in pursuance of the said agreement and undertaking and that after the said shipment, and before the said freight became payable according to the terms of the said bill of lading, and after the defendant had indorsed the said bill of lading to the said J. Edwards as aforesaid, the said J. Edwards indorsed the said bill of lading to the plaintiffs in pursuance of the agreement and undertaking aforesaid and as security for the said advance and a still further advance then made by them upon the same security ; by reason of which said indorsements the property in the said goods passed to and vested in the plaintiffs, who continued the owners of the said goods from thence until and at the time of the said freight becoming payable. And the defendant further saith that the said bill of lading was so signed and delivered to him as aforesaid after the passing of the statute made and passed in the nineteenth year of the reign of Queen Victoria, intituled "An Act to amend the Laws relating to Bills of Lading;" and that the said freight claimed by the plaintiffs is the freight mentioned in the said bill of lading, and that the same accrued

due under and by virtue of the said bill of lading and not otherwise.

Replication.—That the said second advance in the plea mentioned was made upon the estimate between the plaintiffs and the said J. Edwards of the value of the said goods as freight paid, and that the arrangement as to the shipment of the said goods and the terms for the carriage of the same was made only between the defendant and the agents of the plaintiffs at Liverpool, the said agents of the plaintiffs having then only a general authority from the plaintiffs to act in regard to the agreeing about the shipment of goods for freight; and the plaintiffs were not aware of the employment of the defendant by the said J. Edwards as his agent in the said shipment before the receipt by the plaintiffs of the indorsed bill of lading.

Demurrer and joinder therein.

Kemplay, in support of the demurrer.—The plea affords a good answer to the action, and the replication is no answer to the plea. Before the shipment of the goods the plaintiffs made an advance to Edwards of 400*l.*, upon his undertaking that, being about to ship certain goods, he would indorse to the plaintiffs, as a security, a bill of lading wherein the freight should be payable in this country by Edwards. Edwards employed the defendant to ship the goods, and the master signed a bill of lading, by which it appeared that the defendant shipped the goods “as agent.” A second advance was made by the plaintiffs to Edwards, and he indorsed the bill of lading to them as a security for both advances. Now, assuming that the defendant, not having disclosed his principal, would *prima facie* be liable to pay the freight, yet Edwards was also liable and would be bound to indemnify the defendant; and the plaintiffs, when the bill of lading was indorsed to them, had notice that

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the defendant was agent only, and they made the advances to Edwards upon an undertaking that the freight should be paid by him. [*Martin, B.*—If a person contracts with another to pay him a sum of money on a certain day, is it any answer to say that the latter made a bargain the day before with a third person to pay the money? A man who ships goods under a bill of lading is absolutely liable to pay the freight. The plaintiffs made the advances on the undertaking that the goods were to be delivered to them free of freight. *Bramwell, B.*—Edwards undertook to indorse the bill of lading to the plaintiffs as a security for the advances: the bill of lading was given to the defendant, and before he indorsed it to Edwards he ought to have demanded the freight.] It is inequitable to call on the agent to pay when the plaintiffs have the undertaking of the principal, who is bound to indemnify the agent. [*Wilde, B.*—The defendant having made an express contract to pay, why should not the plaintiffs have the benefit of that also?] Moreover, the bill of lading was indorsed to the plaintiffs before the freight became payable, and it is submitted that, by the 18 & 19 Vict. c. 111, the defendant is not liable. By the 1st section of that Act, “every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself.” The defendant’s liability, if any, arises from the bill of lading, which was indorsed by Edwards, the legal owner of the goods, to the plaintiffs, and by force of the statute the property in the goods then vested in the plaintiffs, and they became subject to the same rights and liabilities as if the contract had been origi-

nally made by them. [*Martin*, B.—That is not true in every sense: the property does not vest in the way it would by bargain and sale.] The effect of the statute is to render the transferee of a bill of lading liable for freight, just as if the contract had been made with himself. Therefore the plaintiffs, being liable for the freight, must be considered as having paid themselves. [*Wilde*, B.—The meaning of the legislature is that, if a person thinks fit to take a transfer of a bill of lading, he shall be responsible for the freight, but in return he gets a right to sue the owner of the goods.] The legislature, in effect, says that, if a person chooses to become the owner of goods at sea under a contract of carriage, he shall stand in the same situation as the shipper. If the bill of lading had been indorsed to a third person the plaintiffs might have sued him, and they are now in this position. [*Martin*, B.—The statute has no application to this case. It says that every indorsee of a bill of lading “shall be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.” So that the case is the same as if the contract had been made with the person to whom the bill of lading is assigned; but how can a man make a contract with himself?] The indorsement of the bill of lading transferred to the plaintiffs the liability of the defendant to pay the freight. [*Wilde*, B.—The 2nd section says, “Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.” The statute gives a right to sue the indorsee, but does not extinguish the right to sue the original shipper of the goods.]

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Broun, contra.—The plea is bad, for the facts stated in it do not shew any discharge of the defendant's contract. Upon the face of the bill of lading the defendant is liable to pay the freight, and the plaintiffs made the advances upon the additional security of Edwards and upon an estimate of the value of the goods as if the freight had been paid.—(He was then stopped by the Court.)

POLLOCK, C. B.—We are all of opinion that the plaintiffs are entitled to judgment. It is contended that the defendant is not liable, on two grounds. The case has been ingeniously argued, but all that the statute says is this—that if a person becomes indorsee of a bill of lading, by which the property in the goods passes to him, he shall take upon himself the contract of the shipper. The indorsee of the bill of lading may be sued under the statute, because by taking the goods he also takes the liability to pay the freight. The statute creates a new liability, but it does not exonerate the person who has entered into an express contract. The argument of Mr. *Kemplay* amounts to this—the plaintiffs took an indorsement of the bill of lading: if the indorsement had been made to a third person the plaintiffs might have sued him; consequently they are entitled to sue themselves and pay themselves, and therefore we ought to consider that they have been paid and that the defendant is no longer liable. I can conceive a state of things of which that might be the result; but it is not so here, especially as the replication shews that the second advance was made upon the faith of the freight being paid.

MARTIN, B.—I also think that the plea is bad. The transaction disclosed by the plea will be better understood by taking the latter part of the plea first. Edwards, being about to ship certain goods on board a vessel of the plain-

tiffs, applied to them for an advance of 400*l.*, which they agreed to make upon an undertaking that the bill of lading should be indorsed to them as a security and that Edwards should pay the freight. Edwards employed the defendant to ship the goods at Liverpool, and he shipped them under a bill of lading by which he personally contracted to pay the freight. That being so, the bill of lading is indorsed to the plaintiffs, and they make advances in pursuance of their agreement with Edwards. Edwards does not pay the freight, and the plaintiffs have not got what they bargained for, since they have not received the goods freight free as a security for the advances. Then what is there in law or equity to deprive the plaintiffs of the express contract of the defendant to pay the freight? If they had received the money from Edwards the case might have been different, but, as they have never received the money, the undertaking of Edwards has never been performed, and they are entitled to recover the freight from the defendant.

With respect to the statute 18 & 19 Vict. c. 111, I am of opinion that it does not apply. The statement in the plea, of the property in the goods having passed to the plaintiff, is merely a conclusion of law. After stating the facts, the plea goes on to say, "by reason of which said indorsements the property in the said goods passed to and vested in the plaintiffs, who continued the owners of the said goods from thence until and at the time of the said freight becoming payable." That is merely an inference drawn from the previous circumstances, not a statement that the property vested within the meaning of the 18 & 19 Vict. c. 111. That statute means an actual vesting of the property as by bargain and sale, because it begins by a recital that "by the custom of merchants a bill of lading of goods being transferable by indorsement, the property in the goods *may* thereby pass to

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the release"—but that in every case I have seen and that the first action taken in connection with the property has been. For these reasons I think the plea bad.

ANSWER 3.—I am not if known that the plaintiffs are entitled to judgment, but not without some doubt, because I am not to know what took place between the plaintiffs and the defendant in the second place. The plea states that goods were shipped by the defendant on board a ship in which the plaintiffs were owners, deliverable to the order of the defendant, he paying freight for the goods. Therefore, if the matter had stood there the defendant would have been clearly liable to pay the plaintiffs. Then the narrative proceeds thus—that in truth the defendant was only the agent of Edwards and that before the shipment an arrangement was made between the plaintiffs and Edwards that they should make him an advance on the security of the bill of lading; that the plaintiffs made him two advances, and he indorsed the bill of lading to them, by reason whereof the property in the goods vested in the plaintiffs. I understand that the plaintiffs were not aware when they made the advances to Edwards that the freight was not paid, and, if so, I think they are entitled to recover. The plaintiffs say to Edwards, if you will ship goods on board our ship and indorse to us the bill of lading whereby we can have the benefit of the goods without paying the freight, we will make you advances. If, when Edwards brought the bill of lading to the plaintiffs, he had said—"you must pay the freight" no doubt the plaintiffs would either have made less advances or have deducted the amount of the freight, or have taken care that it was paid before they advanced any money. The plaintiffs, however, take the bill of lading upon a representation that they shall have the goods freight free. They might well say to Edwards

"we know the defendant is your agent, but we do not know what arrangement there is between you and him. He may have charged you the amount, or in a variety of ways he may have become liable, as between you and him, to pay the freight." The plaintiffs made the advances under the belief that the defendant was liable to pay the freight, and, instead of advancing what the goods would bear minus the freight, they advanced the whole. That being so, neither in law nor in equity can it be said that the defendant is not liable. My judgment proceeds on the ground that the plaintiffs, when they made the advances to Edwards, dealt with him upon the footing that the defendant was liable to pay the freight.

According to my judgment, the 18 & 19 Vict. c. 111 has no bearing on this case.

WILDE, B.—I am also of opinion that the plaintiffs are entitled to judgment. The result of the facts disclosed by the record is this, that Edwards received advances from the plaintiffs upon the security of the goods shipped on board their ship, and it was understood that the goods were to be freight free, and that if the defendant did not discharge the freight Edwards was to become a debtor to the plaintiffs for the amount, so that the bill of lading would be a security for the whole value of the goods as if the freight was paid. Reading the plea alone, it must be taken that the plaintiffs knew that the defendant was the agent of Edwards, but that is denied by the replication; therefore the goods were shipped by the defendant without any knowledge on the part of the plaintiffs that he was the agent of Edwards. The next step in the transaction is, that the plaintiffs made an advance to Edwards upon the security of the bill of lading by which the defendant contracted to pay the freight, and upon an undertaking by Edwards that he would pay

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the freight. Another advance was made upon an estimate of the goods as freight free, and then the plaintiffs are informed that the shipment was made by the defendant as agent for Edwards. Under these circumstances, what is there to deprive the plaintiffs of their right to sue the defendant for the freight? There is certainly nothing in the statute. The plaintiffs have got the bill of lading, not with the freight paid but with responsible persons to pay it. Notwithstanding the ingenious argument of Mr. *Kemplay*, I agree with my brother *Martin* that the Act applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight. The second section expressly provides that nothing in the Act shall prejudice or affect any right to claim freight against the original shipper or owner. Suppose Edwards had himself shipped the goods and afterwards transferred the bill of lading to a third person, there would have been two liabilities, that of Edwards as shipper, and that of such third person as transferee. Here the original liability of the shipper has never been extinguished. It is said that the defendant incurred the liability for Edwards, and the rights and liabilities of Edwards have vested in the plaintiffs. But the defendant is liable as shipper, and that liability has never vested in the plaintiffs. Upon that ground, as well as upon the grounds stated by my learned brothers, I think that there is no reason, either legal or equitable, why the plaintiffs should not have the full benefit of their contract with the defendant.

Judgment for the plaintiffs.

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SCOPE v. PADDISON.

April 30.

THIS was an action of ejectment to recover possession of certain premises in Lincolnshire. The writ issued on the 14th of September, 1859, and an appearance was entered on the 21st of the same month. No proceedings had been taken since September, 1859, till the 27th of February, 1861, when the plaintiff gave the defendant notice of his intention to proceed, pursuant to the 176th Practice Rule of Hilary Term, 1853 (a). The plaintiff afterwards applied to *Martin*, B., at chambers, for an order to examine, *vivâ voce*, a witness who was a hundred years old, which application was opposed by the defendant on the ground that, as no proceedings had been taken for a year, the plaintiff was out of court. The learned Judge having referred the parties to the Court,

The 58th section of the Common Law Procedure Act, 1852, which enacts that "a plaintiff shall be deemed out of Court, unless he declare within one year after the writ of summons is returnable," does not apply to the action of ejectment.

Hayes, Serjt., in the present term (April 18), obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to examine the witness *vivâ voce*.

Field now shewed cause.—Under the practice in ejectment prior to the Common Law Procedure Act, 1852, the declaration was served on the tenant in possession, and if he did not in due time make himself a party to the action by entering into the consent rule to confess lease, entry and ouster, the lessor of the plaintiff was entitled to move for judgment against the casual ejector. That motion, however,

(a) Reg. Gen. Hil. T. 1853, r. 176.—"In all causes in which there have been no proceedings for one year from the last proceeding had, the party, whether plaintiff or defendant, who desires to proceed shall give a calendar month's notice to the other party of his intention to proceed."

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could not be made after the expiration of two terms after the service of the declaration, for he was then out of Court. In other actions if the plaintiff did not declare within a year and a day he was out of Court. That was not in consequence of any rule on the subject, but depended on the practice of the Court. The legislature has now made that the law which was before the general practice. By the 58th section of the Common Law Procedure Act, 1852: "A plaintiff shall be deemed out of Court unless he declare within a year after the writ of summons is returnable." The language is general, and includes actions of ejectment. If it had been intended to exclude ejectment it would have been expressly mentioned, as in the 41st section, which provides that: "Causes of action of whatsoever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment." An ejectment is now commenced by writ: sect. 168; and after appearance entered the issue may at once be set up by the claimant: sect. 178; and if he omit to do so for a year he is out of Court. [*Martin, B.*—If no appearance is entered within sixteen days the plaintiff may sign judgment; when does the power to sign judgment cease?] There must be some limit; it never could have been intended to allow the claimant an indefinite time to proceed.

Hayes, Serjt., in support of the rule.—The 58th section of the Common Law Procedure Act, 1852, has reference to ordinary actions. It cannot apply to ejectment, because in that action there is no declaration, and it is not commenced by writ of summons. The 202nd section affords an answer to the suggestion that the proceedings may be pending an indefinite time. It says: "If after appearance entered the claimant, without going to trial, allow the time allowed for going to trial by the practice of the Court in

ordinary cases after issue joined, to elapse, the defendant in ejectment may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice ; and if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the Court or a Judge, the defendant may sign judgment &c., and recover the costs of defence."—He was then stopped by the Court.

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POLLOCK, C. B.—We are all of opinion that the rule ought to be absolute.

MARTIN, B.—If the matter had rested with me I own that I should have been disposed to think that the 58th section applied.

BRAMWELL, B.—There is no doubt the rule ought to be absolute. The statute does not prescribe any time for making up the issue, but it provides against inconvenience in that respect by the 202nd section, which enables the defendant to sign judgment for not proceeding to trial after twenty days' notice. Joinder in issue need not be within the year in any other action ; then why should it be in ejectment ? Upon the ground that this is a new mode of proceeding, viz., a proceeding to trial with no intermediate step between the appearance to the writ and issue, it seems to me that any old rule saying when the plaintiff shall declare cannot be applied to it.

WILDE, B., concurred.

Rule absolute.

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April 25.

PEGLER v. THE MONMOUTHSHIRE RAILWAY AND CANAL
COMPANY.

A railway Company were required, by their special Act, to carry as common carriers for hire, and to afford to all persons, conveying or sending goods upon their railway every reasonable convenience and facility for loading and unloading goods. The Act also authorized the Company, for carriage of goods, to demand a toll not exceeding three pence per ton per mile.—*Held*, that the Company were not entitled to charge an additional sum for services performed, accommodation afforded, and expense and risk incurred in and about the receiving, loading, unloading and delivering the goods.

THIS action was brought to recover the sum of 12*s.* 6*d.*, as money had and received by the defendants for the use of the plaintiff. The defendants pleaded that they never were indebted.

The cause came on to be tried, before *Hill, J.*, at the last Monmouthshire Summer Assizes, when a verdict was found for the plaintiff for the sum of 12*s.* 6*d.*, subject to the opinion of the Court upon the following case:—

The defendants are the owners of a railway from the town of Newport to the town of Pontypool, in the county of Monmouth, under the provisions of the “Newport and Pontypool Railway Act, 1845,” and are common carriers of passengers and goods upon the said railway. The plaintiff is a grocer, carrying on business in the town of Pontypool. On the 24th and 25th of November, 1859, 100 sacks of flour, weighing altogether twelve tons and a half, and addressed to the plaintiff at the railway station, Pontypool, were taken to the goods station of the defendants’ railway at Newport, and were there delivered to, and received by, the defendants as common carriers, to be carried by them upon their railway to Pontypool, and there delivered to the plaintiff. The flour was brought to the station at Newport by the plaintiff’s agents, and was received by the defendants’ servants there, who assisted in unloading the same, and then wheeled it, in defendants’ platform trucks, along their platform and loaded it into the defendants’ trucks. These trucks were first shunted from the siding at Newport Station to the loading shed there; and, after being loaded with

the flour were again shunted to the proper siding for forming the goods train going to Pontypool. The flour was then carried by the defendants, as common carriers, from the station at Newport to the defendants' goods station at Pontypool. On arrival at the said station, the trucks containing the flour were shunted to the defendants' goods shed there, and the flour was there delivered to the plaintiff, and by his servants, assisted by the servants of the defendants, unloaded immediately from the defendants' trucks into the carts of the plaintiff, and conveyed in such carts to the plaintiff's place of business. The distance from the station at Newport to the station at Pontypool is nine miles and a half; and, after the delivery of the flour at Pontypool, the defendants demanded from the plaintiff, for and in respect of the carriage thereof, from Newport to Pontypool, the sum of 2*l.* 10*s.* This amount was made up of a toll charge at the rate of three pence per ton, per mile, and a sum of 12*s.* 6*d.* claimed as a terminal charge, in respect of services performed, conveniences provided, and expenses incurred, in and about the receiving and delivering of the flour at the defendants' stations.

The services, conveniences and expenses, in respect of which the defendants claim the right to demand this terminal charge, are—the receiving of the flour by their porters and servants, when brought to their station at Newport, and the weighing and invoicing of the same and loading it on their trucks, and for the use of their stations, yards, sheds, and platforms at Newport and Pontypool, and the gas light, and all other conveniences necessarily connected with such stations, sheds, and platforms, for the purpose of receiving, and loading and unloading goods, and which are erected and are maintained by them for the purpose of carrying on the business of carriers under the provisions of their said Act; and also for the making of proper entries of the receiving and delivering of the flour, by the defend-

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ants' clerks and agents, in books kept for that purpose ; and also for the risk incidental to the loading, carrying, and unloading.

By the 104th section of "The Newport and Pontypool Railway Act, 1845," which provides for the tolls to be demanded by the defendants for the use of the railway, as amended by section 34 of "The Monmouthshire Railway and Canal Act, 1853," the defendants were empowered to demand for the use of the railway, in respect of the tonnage of flour conveyed upon the same, where locomotive power and trucks were provided by the Company, a sum not exceeding three pence per ton per mile ; and by section 105 of "The Newport and Pontypool Railway Act, 1845," it is enacted that the following provisions and regulations shall be applicable to the fixing of the tolls mentioned in the 104th section, and also to the tolls payable for locomotive power, that is to say, for articles or persons conveyed on the railway for a less distance than four miles, the Company may demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expense of stopping, loading and unloading, and further, "that for a fraction of a mile beyond four miles, or beyond any greater number of miles, the Company may demand tolls on merchandize for such fraction in proportion to the numbers of quarters of a mile contained therein ; and, if there be a portion of a quarter of a mile, such fraction shall be deemed a quarter of a mile," and that "for a fraction of a ton the Company may demand toll according to the number of quarters of a ton in such fraction ; and, if there be a fraction of a quarter of a ton, such fraction shall be deemed a quarter of a ton."

The plaintiff disputed the right of the defendants to demand, for the carriage and conveyance by them as common carriers of the said flour, and the receiving and delivering of them as aforesaid, more than the tolls chargeable under the aforesaid sections for the use of the railway in respect

of the tonnage of flour conveyed along the same, and the tolls payable for providing trucks and locomotive power for such conveyance, and refused to pay the sum of 12*s.* 6*d.* demanded as a terminal charge. The plaintiff afterwards paid the whole sum under a protest, and brought the present action to recover back the said sum of 12*s.* 6*d.*

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The defendants' special Acts are to be considered as forming part of this case.

It is agreed that, if the defendants are entitled to charge any sum for a terminal charge in respect of the matter hereinbefore mentioned, the sum of 12*s.* 6*d.* is a reasonable charge.

The question for the opinion of the Court is, whether or not the defendants were entitled to demand from the plaintiff the payment of the said sum of 12*s.* 6*d.* over and above the tolls mentioned in the above sections of their special acts of parliament.

If the Court shall be of opinion the defendants were not entitled to make such charge, then the verdict is to stand, and final judgment is to be entered for the plaintiff.

If the Court should be of a contrary opinion, then the verdict is to be set aside, and a verdict and final judgment entered for the defendants.

J. Brown (*Pigott*, Serjt., with him), for the plaintiff.—The defendants are not entitled to make this "terminal" charge of 12*s.* 6*d.*, in addition to the tolls authorized to be taken by their special Acts. The "Newport and Pontypool Railway Act, 1845" (8 & 9 Vict. c. clxix.), by section 1 incorporates the Railway Clauses Consolidation Act, 1845. By section 128 (a) the Company are required to carry,

(a) Section 128.—"That the carriers for hire, on their existing Company shall and they are hereby railways, within three years after required to carry, as common the passing of this Act, and also

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as common carriers for hire, on their railways, passengers, animals and goods, and to afford all persons sending goods upon their railways every reasonable convenience and facility for loading and unloading goods at the several stations. The 104th section prescribes the amount of the tolls which the Company are authorized to demand for the use of their railway. By the interpretation clause (sect. 146) "the word toll shall include any charge or payment for any passenger, animal, or goods upon any canal


on the railway when and as soon as the same shall be open for traffic, by means of locomotive steam-engines or other moving power, in their own carriages and in the carriages of other persons, all passengers, animals and goods which may be brought to their railways, and which they may be required to convey thereon; and the Company shall afford to all persons conveying or sending goods upon their railways every reasonable convenience and facility for loading and unloading goods upon and from the carriages, whether their own or those of the Company, at the several stations or other places for delivery or receiving such goods, without giving any preference or priority to one person over another in the time or manner of loading, unloading, receiving, conveying or delivering such goods." This section was repealed by "The Monmouthshire Railway and Canal Act, 1852," 15 & 16 Vict. c. cxxvi., s. 1, and, by section 5, it was enacted:—"That the Company shall and they are hereby required to continue to carry, as common carriers for hire, on such of their existing roads as are or have already been

adapted for locomotive engines and carriages, &c., by means of locomotive steam-engines or other moving power, in their own carriages, all passengers and those goods, wares, merchandise, matters and things, for which, by 'The Newport and Pontypool Railway Act, 1845,' the Company are entitled to demand tolls not exceeding one halfpenny per ton per mile in respect of carriages if provided by them; and also to convey in the carriages of other persons all passengers, animals and goods which may be brought to their said tramroads or railways, and which they may be lawfully required to convey thereon; and the Company shall afford to all persons conveying or sending goods upon their railways every reasonable convenience and facility for loading and unloading goods upon and from the carriages, whether their own or those of the Company, at the several stations or other places for delivering or receiving such goods, without giving any preference or priority to one person over another in the time or manner of loading, unloading, receiving, conveying or delivering such goods."

or railway, whether for the use of the canal or railway, or for the moving power, or for the use of carriages." The toll allowed to be taken by section 104 of the Newport and Pontypool Railway Act, 1845, as amended by the 34th section of the Monmouthshire Railway and Canal Act, 1853 (16 & 17 Vict. c. cxcv.), for the conveyance of flour on the railway, is two pence per ton per mile, and one halfpenny per ton per mile in respect of locomotive power. By the 134th section the Company may demand, in addition, one halfpenny per ton per mile for the use of locomotive power. By the 105th section, which contains provisions and regulations as to the fixing of tolls, "For articles or persons conveyed on the railway for a less distance than four miles, the Company may demand, in addition to the prescribed tolls for conveyance, a reasonable charge for the expence of stopping, loading and unloading." That provision shews that in other cases the Company are not to make any additional charge. Moreover, by the 92nd section of the "Railways Clauses Consolidation Act, 1845," it is expressly declared that "it shall not be lawful for the Company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers or goods, than they are by this and the special Act authorized to demand." It is said that this charge is not for the carriage of the goods, but for terminal service incidental to the carriage; but it is not possible to carry heavy goods without loading and unloading them in trucks. In *Parker v. The Great Western Railway Company* (a), it was held, that where the Company acted as carriers, they were not entitled to charge for loading and unloading, in addition to the rate for carriage. There (b) *Jervis*, C. J., said "Where parties use their own trucks and ask the Company to load them, they are entitled to charge for so doing."

(a) 11 C. B. 545.

(b) Page 569.

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And *Maule, J.*, said: "It may be that the customer may wish the Company to load and unload, or to weigh and warehouse the goods; for that the Company are empowered to make an extra charge; but the rate for carriage includes the taking the goods into the hands of the Company, and loading them on, and unloading them, from the trucks." In *Parker v. The Great Western Railway Company (a)*, the Company were allowed to charge a higher rate for particular parcels, because their special Act authorized them to do so. The greater portion of the service now charged for is for the benefit of the Company; the rest is incidental to the carriage of the goods. There is no contract which entitles the Company to make their charge, and the Act has given them no statutory right.

Phipson (Gray with him), for the defendants.—The defendants are entitled to make this charge of 12s. 6d. when they act as common carriers. The tolls mentioned in the 8 & 9 Vict. c. clxix. are for the *use of the railway* by persons *as freighters*. All persons may carry goods on the railway in their own carriages, in which case, by section 104, the tonnage is two pence per mile, but, if conveyed in carriages belonging to the Company, they are entitled to charge in addition one halfpenny per ton per mile. The 93rd, 94th and 95th sections of the 8 & 9 Vict. c. 20 apply to this toll, which is a tonnage rate payable for the use of the railway. The 104th section of the 8 & 9 Vict. c. clxix. expressly says "that the Company may demand the following tolls for the *use of the railway*." The intention was, that any person might use the railway as a highway on payment of the tolls. The 110th section recites "that the Company, at the request of the freighters on their existing railways, have agreed to improve such railways

(a) 6 E. & B. 77.

so as to adapt them for the passage of locomotive steam engines, and also to become carriers on such railways," &c. It then enacts that the Company shall, within three years, adapt their railways for the convenient passage of locomotive steam engines for the carriage of goods, and provide carriages and locomotive steam engines, and erect stations, &c. [*Wilde, B.*—By the 86th section of the 8 & 9 Vict. c. 20 the Company may carry and convey on their railway passengers and goods, "and make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special Acts authorized to be taken by them."] The meaning is that the Company shall not make charges exceeding the tolls prescribed by the special Act, in respect of carrying as common carriers. [*Wilde, B.*—The 90th section of the 8 & 9 Vict. c. 20 enables the Company to vary the tolls by the special Act authorized to be taken.] That has reference to tolls properly so called, and to which the 93rd, 94th and 95th sections apply. The 90th section is not required with reference to carriers charges, because provision is made for them by the 86th section. [*Bramwell, B.*, referred to the 106th section (a) of the 8 & 9 Vict c. clxix.] That clause relates to the Company as carriers. Having complied with the requisitions of the Act, by providing locomotive power and erecting stations, &c., the Company are entitled to charge for these services which are incidental to their business as common carriers. It could never have been intended that they should be compelled to carry, and yet be restricted to the tolls for the *use of the railway*. By the 128th section the Company are required to carry as

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(a) Section 106.—"And with respect to small packages and single articles of great weight, be it enacted, that notwithstanding the rate of tolls hereby prescribed the Company may lawfully demand the tolls following" (that is to say), &c.

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common carriers within three years after the passing of their Act. Now, if the railway was completed in one year they would be entitled to the tolls prescribed by the Act; then are they to have no remuneration for the increased expense and risk when, at the end of three years, they become common carriers? There is nothing in the Acts to prohibit them from charging, in addition to the toll, a reasonable sum for the services rendered and accommodation afforded by them as common carriers.

J. Brown, in reply.—If the construction contended for by the defendants be correct, all railway Companies whose Acts are framed in this way are without any limitation of charge when they act as common carriers.—He was then stopped by the Court.

POLLOCK, C. B.—We are all of opinion that this charge ought not to have been made. The question is, whether the Company are entitled to charge in respect of the services mentioned in the case, and for which they claim what are called “terminal charges.” I am of opinion that they cannot. It appears by the case that, on the 24th and 25th of November, 1859, 100 sacks of flour, weighing altogether twelve tons and a half, and addressed to the plaintiff at the railway station, Pontypool, were taken to the goods station of the defendants’ railway at Newport, and were there delivered to, and received by, the defendants as common carriers, to be carried by them upon their railway to Pontypool, and there delivered to the plaintiff. The flour was brought to the station at Newport by the plaintiff’s agents, and was received by the defendants’ servants there, who assisted in unloading the same, and then wheeled it, on the defendants’ platform trucks, along their platform, and loaded it into the defendants’ trucks. For these services the

Company have no right to charge anything more than the tolls authorized by their Acts. They might as well charge for the expense of making the railway, or any other cost. Therefore I think the plaintiff is entitled to our judgment.

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MARTIN, B.—I am of the same opinion. Except the charge for “making proper entries of the receiving and delivering the flour by the defendants’ clerks and agents, in books kept for that purpose” (which is obviously for the benefit of themselves), all that they seek to charge for was done by them as common carriers, and for the purpose of affording a reasonable facility of loading and unloading the goods. But the 128th section requires them to carry as common carriers for hire, by locomotive engines, passengers and goods, and to afford all persons sending goods upon their railways every reasonable convenience and facility for loading and unloading them; so that a positive duty is imposed upon them in this respect. Then, by the interpretation clause, the word “toll” shall include any charge or payment for any passenger or goods conveyed upon the railway, whether for the use of the railway, or for moving power, or for the use of carriages. What could the legislature do more than provide that the word “toll” shall have this general meaning—that it shall include the charges for everything a carrier does? Here is a Company who are bound to carry on their railway, and are required to charge one sum for the use of the railway, locomotive power and carriages. It is said, that for the reasonable facilities they afford they may charge what they like, for that is what the contention comes to. But, it seems to me that the meaning of the Act of Parliament is, that the Company may make a bargain with the public for the convenience and accommodation they afford; but, if there is

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no bargain, they are bound to carry at the rate per ton per mile fixed by their Act.

BRAMWELL, B.—I am of the same opinion. Mr. *Phipson's* argument is, that the tolls prescribed by the Act do not apply when the Company act as common carriers, and that they may provide a railway, locomotive power and carriages, and yet not be common carriers. That is an ingenious argument, and perhaps it might be so if the Company thought fit to make such an arrangement. They might say, "Here is the railway, locomotive engines and trucks; you must drive them yourself, we will undertake no responsibility." However, they did not do so, but took the plaintiff's goods without any such stipulation. Now, it is manifest to my mind that the 128th section requires, not only that the Company shall be common carriers for hire, but upon payment of the tolls mentioned in the Act, otherwise it would be nugatory. To say that the Company shall be carriers, at whatever rate they choose to charge, is saying nothing, because, if they did not like to carry, they might charge any amount they pleased, and so prevent the public from employing them. The meaning of the 128th section is, that they shall be carriers on the terms prescribed, and entitled to charge at the rate mentioned, and no more. Therefore, it seems to me that the Company, having made no previous bargain with plaintiff for a further sum, are not entitled to it. Possibly the Company may ultimately succeed in making the public pay more, because they may say, "We will carry your goods, but will do nothing to help you: you must bring your goods to the trucks, and then we will carry them, and, when they are unloaded, we will afford you no facility for taking them away." In such case, it may be that the owner of the goods would say, "I will pay something for the accommodation." But that must be

by way of bargain: in the absence of any bargain, the statutory tolls apply when the Company act as common carriers.

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WILDE, B.—I am also of opinion that the Company are restricted to the “tolls” specified in their special Act. The argument of Mr. *Phipson* is, that the tolls do not apply where the Company act as common carriers; and, indeed, he was obliged to take that line of argument, because the general Act, 8 & 9 Vict. c. 20, s. 86, expressly provides that it shall be lawful for the Company to carry and convey goods offered to them for that purpose, “and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special Act authorized to be taken by them.” Looking at the special Act, it is obvious that the tolls therein specified do apply, whether the Company carry for other people as freighters, or by themselves as carriers. First, there is no limitation to the word “tolls;” and, secondly, in the 106th section the word “tolls” is used with reference to the carriage of small packages, and beyond all doubt to the carrying of them by the Company. I was struck with the remark of my brother *Bramwell*, that, if the tolls did not apply to the Company as common carriers, it would be idle to enact that they shall be common carriers, because, if they did not like to carry, they might charge what they pleased, and so prevent the public from employing them. Therefore, I think that the tolls mentioned in the special Act do apply to goods carried by the Company as common carriers; and, consequently, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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May 7.

LEMERE v. ELLIOTT.

In order to support an account stated there must be an admission of a debt due. Therefore where the defendant verbally agreed to purchase of the plaintiff the lease and goodwill of his premises, and, on being asked for a deposit, gave an I. O. U. for 25*l.*, but afterwards refused to complete the purchase:—*Held*, that the I. O. U. was not evidence of an account stated.

ACTION for money payable by the defendant to the plaintiff on an account stated.

Plea—Never indebted.

The cause was tried before *Channell B.*, without a jury, at the Middlesex Sittings in the present Term, when the following facts appeared.—In May 1860 the plaintiff, who carried on business as an oil and colourman in High Street, Shoreditch, verbally agreed with the defendant, who had been a publican, to sell him the lease and goodwill of his premises. It was arranged that the defendant should give the plaintiff 185*l.* for the lease, goodwill and fixtures, and a sum not to exceed 250*l.* on valuation of stock in trade. The valuation was to be made, and a written agreement entered into, on completion of the bargain on the 21st June following. In the meantime the plaintiff was to introduce the defendant to his out-door customers by driving him about with him, and to allow the defendant to serve in his shop behind the counter; also to introduce him to his wholesale customers and instruct him in the business. There were certain rooms on the first and second floor of the premises which the plaintiff had let to weekly tenants, and notice to quit was to be given, but nothing was said by whom. The plaintiff drove out the defendant several times, and introduced him to the out-door and wholesale customers; and the defendant served behind the counter and was instructed in the business. When the terms were agreed to, the plaintiff required a deposit of 25*l.* The defendant said he had not so much with him, but would give an I. O. U. for the amount, and he gave

the I. O. U. upon which this action was brought. The tenants quitted before the 21st of June, in consequence of a notice given by the defendant. On the 27th July the defendant refused to complete the contract, and in October the plaintiff sold the business to another person.

The learned Judge nonsuited the plaintiff, on the ground that, if a question of law, he decided there was no account stated; if not a question of law, but a question for him on the evidence, sitting as a jury, then he said no account stated was proved. But if, supposing a jury present, he ought to have directed them that they ought to find an account stated, then the plaintiff was to have leave to move to enter a verdict for 25*l*.

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Phipson now moved to enter the verdict for the plaintiff.— There was evidence of an account stated. [*Channell*, B.— An “account stated” means an account stated of a debt *due* from the defendant to the plaintiff. Here the I. O. U. was merely given as a security for a deposit. *Martin*, B.— There was no account stated, because there was no debt due from the defendant to the plaintiff.] An I. O. U. is an acknowledgment on the face of it of an existing debt; and though at the time it is given no debt has accrued, if there is a subsequent consideration, it is to that extent a good account stated. Here the consideration was the introducing the defendant to the plaintiff’s customers, and instructing him in the business. If a person gave an I. O. U. for goods which were afterwards supplied to him, the I. O. U. would be evidence of an account stated; and if the amount exceeded the consideration, the holder would be a trustee for the excess. [*Martin*, B.—The old form of a count on an account stated was this:—“And whereas the said C. D. afterwards, to wit, on &c., accounted with the said A. B. of and concerning divers sums of money from the said C. D. to the said A. B. *before that time due and*

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owing, and then in arrear and unpaid. And upon that account the said C. D. was then and there found to be in arrear and indebted to the said A. B. in the sum of £ ” &c. *Wilde, B.*—In *Porter v. Cooper* (a) *Parke, B.* said, “I agree with what has fallen from my brother *Alderson* in the course of the discussion, that in the later cases the Courts have deviated far from what was the original meaning of an account stated. I take the rule to be this: that if there is an admission of a sum of money being due, for which an action will lie, that will be evidence to go to the jury on the count for an account stated.”] A mere admission of a debt is sufficient to support an account stated. In *Cocking v. Ward* (b) it was held that, though no action for the consideration will lie on a verbal agreement for the transfer of land, notwithstanding the transfer has been effected and nothing remains to be done but to pay the consideration, yet, when after the transfer the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered in a count on an account stated. If the rule stated by *Parke, B.*, in *Porter v. Cooper* (a) be correct, no action would lie in *Cocking v. Ward*. There *Tindal, C. J.*, in delivering the judgment of the Court, said: “In *Knowles v. Michel* (c), the ground of the original debt was a sale to the defendant of standing trees, which the defendant afterwards procured to be felled and taken away; and the objection was that the plaintiff could not recover on the original contract for standing trees which formed part of the realty: but it was held, nevertheless, that the acknowledgment of the price to be paid for the trees, after they were felled and applied to the use of the defendant, was sufficient to sustain the count on the account stated; Lord *Ellenborough* saying, that if there were an acknowledgment by the defendant of a debt due

(a) 1 C. M. & R. 387. 394.

(b) 1 C. B. 858.

(c) 13 East, 249.

to the plaintiff upon any account, it was sufficient to enable him to recover on an account stated."

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POLLOCK C. B.—We are of opinion that there ought to be no rule. The holder of an I. O. U. cannot be considered in the same position as the payee of a promissory note. Though a promissory note cannot be sued upon if made without consideration, yet, if consideration be afterwards given, it may be made available to that amount. An I. O. U. professes to be the result of an account stated in respect of a *debt due*; and it is important not to make fiction supply the place of truth, and say that an account has been stated in respect of a debt, when in reality there was none.

MARTIN, B.—I am also of opinion that there ought to be no rule. An account stated is that mentioned in the old form of declaration to which I have referred. No doubt, what is said by Parke, B., in *Porter v. Cooper* (a) is the essence of it, viz., that there must be an admission of a *debt due*. In *Whitehead v. Howard* (b) it was also said that there must be a real existing debt due. Here there was no debt whatever. Supposing there was a part performance of the agreement, that is nothing more than an executory contract, to be performed by the sale of the house and business; and so long as it remains unexecuted there is no consideration for an account stated.

WILDE, B.—I am of the same opinion. There was no sum admitted to be due for which an action would lie; and upon the substance of the transaction there was no debt to support an account stated.

CHANNELL, B.—I am of the same opinion as I was at the trial.

Rule refused.

(a) 1 C. M. & R. 387. 394.

(b) 5 Moore, 105.

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April 26.

DARRELL v. EVANS and Others.

The defendant having negotiated with the plaintiff, a hop-grower, for the purchase, by sample, of some hops, went with him to his factor, when the defendant agreed to buy the hops, and in the presence of both parties, the factor wrote out bought and sold notes, the former of which contained the name of the defendant, and was delivered by the factor to him. The

ACTION for not accepting hops sold by the plaintiff to the defendant.

Plea.—Non assumpsit.

At the trial before *Pollock*, C. B., at the London Sitting after last Michaelmas Term, the following facts appeared:—The plaintiff, who was a hop-grower, in Surrey, having some hops to sell, sent a sample of them to Messrs. Noakes, his hop-factors, in the borough of Southwark. One of the defendants went there and inspected the sample, and inquired the price. On the 19th of October, 1860, the same defendant met the plaintiff in London, and after some conversation about the purchase of the hops went with him to Messrs. Noakes. There the plaintiff agreed to sell the defendants thirty-three pockets of hops, according to sample at 16*l.* 16*s.* per cwt., and one of the Messrs. Noakes wrote in their book bought and sold notes as follows:—

Bags.	Pokts.	"Sold to Messrs. Evans,	Bags.	Pokts.	Messrs. Evans,
	33	T. Darrell—Ryarsh and Addington £16 16		33	Bought of T. F. and W. Noake
		20th Octr. 19/1860			T. Darrell.
					Ryarsh
					and Addington } £16 1
					20
					Octr. 19/1860

date of the notes was altered by the factor, at the request of the defendant, in order to give him further time for payment. The hops were afterwards weighed in the presence of the plaintiff and defendant, when a dispute arose as to their weight and condition, and the defendant refused to accept them.—*Held*, that the factor was not the agent of the defendant to bind him by signing his name to the contract, and therefore there was no sufficient memorandum or note in writing within the 17th section of the Statute of Frauds.

Messrs. Noakes tore off the bought note and gave it, in the presence of the plaintiff, to the defendant; the sold note was given to the plaintiff. The date of the notes was altered by Messrs. Noakes, at the request of the defendant, from Friday the 19th to Saturday the 20th of October, it being the custom in the hop trade to pay on the Saturday next after the purchase, so that by the alteration the defendant obtained a week's time for payment. The samples and an invoice were afterwards sent to the defendants. On the 23rd of October the hops were sent to the factor, according to usage, to be weighed. The plaintiff, and also one of the defendants was present during some portions of the weighing. One of Messrs. Noakes's warehousemen weighed for the plaintiff, and one of the defendant's men weighed for them. A dispute arose about the weight of the hops, and the defendant said they were wet or damp, and refused to accept them. The market value of the hops afterwards fell, so that on the 3rd of November, the day for payment, the hops were not worth more than 8*l.* a cwt.

It was submitted, on behalf of the defendants, that there was no note or memorandum in writing signed by the defendants or their agent lawfully authorized, as required by the 17th section of the Statute of Frauds, 29 Car. 2, c. 3. A verdict was entered for the plaintiff for 420*l.*, leave being reserved to the defendants to move to enter a non-suit.

Lush, in the following term, obtained a rule nisi accordingly; against which

T. Jones and *Waddy* shewed cause.—The signature of the defendant's name on the bought note by Messrs. Noakes is sufficient to satisfy the requisites of the 17th section of the Statute of Frauds. [*Pollock*, C. B.—A broker is the agent of both buyer and seiler; a factor is the agent of the seller

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only.] The defendants treated Messrs. Noakes as their agent for the purpose of making a valid contract. The date of the note was altered by Messrs. Noakes at the request of the defendants. The samples and invoice were sent to the defendants, and, up to the time of weighing, both parties acted on the faith of this being a valid contract. In *Schneider v. Norris* (a) a bill of parcels in which the vendor's name was printed, and that of the vendee written by the vendor, was held a sufficient memorandum within the statute. So, where the vendee wrote in his own book a note of the contract, which contained his name and was signed by the vendor's agent, that was held sufficient: *Johnson v. Dodgson* (b). The rule, that one contracting party cannot be an agent for the purpose of binding the other by his signature, is confined to cases where the party acting as agent for the other is not only a principal but a party upon the record: *Farebrother v. Simmons* (c). But no case has decided that, where the party who signs the note is not a principal but the agent of one of the contracting parties, his signature will not bind the other party. *Farebrother v. Simmons* (c), which was decided on the authority of *Wright v. Dannah* (d) is commented on in *Bird v. Boulter* (e), where it was held that the auctioneer's clerk, who wrote the name of the buyer in the sale book with his assent, was his agent for the purpose of charging him with the contract. There *Littledale, J.*, said: "It is indeed irregular that the real buyer or seller should make the other party his agent to sign a memorandum under the statute; but when that is done through a third person the objection is removed. [*Wilde, B.*—You must establish that the factor, at the time he wrote the defendants' name, affected to write it for the

(a) 2 M. & Sel. 286.

(b) 2 M. & W. 653.

(c) 5 B. & Ald. 333.

(d) 2 Camp. 203.

(e) 4 B. & Adol. 443.

defendants.] The circumstance of the party who signed being a factor will not prevent a jury from coming to the conclusion that he signed as agent for the defendants. The conduct of the defendant shews that he considered Messrs. Noakes his agent for the purpose of drawing up the contract. [*Martin*, B.—It has been decided, whether rightly or wrongly, that the person signing need not be an agent to make the contract, but only to sign it.] There is no foundation for the distinction between a broker and a factor when signing a contract. Neither a broker nor an auctioneer is necessarily agent for both contracting parties; that depends on the facts of each particular case: *Bartlett v. Purnell* (a). [*Pollock*, C. B., referred to *Graham v. Musson* (b).] That case is distinguishable, because there the name of the buyer did not appear on the note, but the seller's agent signed his own name, and there was no evidence that he was authorized to sign it as agent for the buyer. *Coltman*, J., there observed that "if the seller's agent had signed the buyer's name, without any expression of dissent by him, the case would have been brought very near *Bird v. Boulter*" (c). [*Wilde*, B.—Suppose a person goes into a shop and purchases goods above the value of 10*l.*, and says to the shopman, "make out an invoice of the goods," and he does so, and hands it to the purchaser, how does that amount to an authority to sign his name as agent? This case is no more than that.] In *Mews v. Carr* (d) the memorandum was signed by the auctioneer for his own guidance, and was never intended to be handed over to the other party as a note of the contract. Even assuming that Messrs. Noakes had not sufficient authority, at the time, to bind the defendants by signing their names to the contract, the subsequent ratification of their

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(a) 4 A. & E. 792.

(b) 7 Scott, 769.

(c) 4 B. & Adol. 443.

(d) 1 H. & N. 484.

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act rendered them agents lawfully authorized within the meaning of the statute: *Maclean v. Dunn (a)*. [Wilde, B. —The person whose act is ratified must have *acted for the principal*, without authority: here you must establish that what was done by Messrs. Noakes was done on behalf of the defendants.] An authority may be presumed from subsequent acts of assent or acquiescence, and a small matter will be evidence of such assent: Paley on Principal and Agent, p. 171, 3d ed.

Hawkins and *Harrison* appeared in support of the rule, but were not called upon to argue.

BRAMWELL, B.—We are all of opinion that the rule must be absolute. There is no doubt about the law with respect to the true construction of the 17th section of the Statute of Frauds, which enacts “that no contract for the sale of any goods, wares, or merchandize, for the price of 10*l*. sterling or upwards, shall be allowed to be good, except the buyer shall,” first, “accept part of the goods so sold, and actually receive the same; or,” secondly, “shall give something as earnest to bind the bargain or in part payment; or,” thirdly, “unless some memorandum or note in writing of the said bargain be made and signed by the parties to be charged with such contract, or *their agents thereunto lawfully authorized*.” The difficulty arises from the application of the statute to the facts of each transaction. The enactment has been much praised, but everything appears to be done to avoid making a binding contract within it. Many authorities have been cited; but no one has gone to the extent of deciding that a document like this is a memorandum signed by an agent lawfully authorized.

The facts are these:—The plaintiff had, in the country,

(a) 4 Bing. 722.

some hops for sale, and he sent a sample of them to his factor in London. One of the defendants went there, and inspected that sample, and inquired the price. That defendant afterwards met the plaintiff, and, having conversed about the hops and the price, went with him to the factor's, where the sample was, and agreed to purchase 33 pockets of the hops at 16*l.* 16*s.* per cwt. By the custom of the hop-market the factor acts for the seller, and what he does is on behalf of the seller alone. In this case the factor made out a note of the bargain, dated the 19th of October, the day of the transaction, but the defendant requested him to alter it to the 20th. No doubt, the factor might have asked the defendant, who was present, to sign the note, which would have ratified the contract, but he did not; and the defendant signed nothing. This bad system, by which the seller is bound and the buyer is not, appears to prevail in the hop-market, and, I understand, the like custom prevails in the corn-market. The defendant might have said to the factor, "Sign this note on our behalf;" and, if he had done so, his firm would have been bound: or, though the defendant did not give express instructions, he might, by his acts or conduct, have shewn an intention to be bound. Here, however, the defendants never authorized the factor to sign for them; nor is there anything to shew an intention on their part to be bound by his signature. I agree with the observation of my brother *Wilde*, in the course of the argument, that this is like the case of a person going into a shop, and, having bought a quantity of goods, saying, "Make me out an invoice of the goods; do not make the price payable immediately, but in a week;" or where, the invoice being made out, he directs some alteration. The defendants had no notion of conferring an authority on the factor to act for them, nor had the factor the slightest idea that he was authorized to act on

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the defendants' behalf. For these reasons, I am of opinion that the Lord Chief Baron was right at the trial, and the rule must be absolute.

MARTIN, B.—I did not hear the whole of the argument, and therefore decline saying anything.

WILDE, B.—I am also of opinion that the ruling of the Lord Chief Baron was correct. In order to constitute a binding contract, within the 17th section of the Statute of Frauds, there must be a memorandum signed at the time, either by the buyer himself or an agent authorized on his behalf. The question then is whether this document which is not signed by the defendants, is a memorandum signed by an agent on their behalf. It is competent for the seller's agent to act for the purchaser; and, in that case, a note signed by him would bind the purchaser. Whether or no this note was handed to the defendant who was present and looked at it, does not seem to me material, because we may assume that he was satisfied with it as altered. The question is, whether he was satisfied with it as a note signed on behalf of the defendants. There is no evidence that he was. The case is the same as if the defendants had asked for an invoice of the goods, and it had been given to them.

POLLOCK, C. B.—I entirely concur. At the trial, I thought it the best course to reserve the point, and, when the matter comes to be examined, it amounts to this: that the defendants interfered with the note as drawn up, and it was altered accordingly. We cannot, from that, infer that they gave the factor an authority to sign the contract on their behalf; and a person cannot adopt and ratify an act which was not originally done on his behalf. This note

was not signed on behalf of the defendants, for a factor is the agent of the seller, not the buyer. I must say that the present case is not one of the most favourable instances of the benefit of the 17th section of the Statute of Frauds; but, while it remains in force, its requisites must be complied with, and Judges ought not to seek for equivalents. The statute requires that the party to be charged, or his agent duly authorized, shall sign the note. I admit that he need not be an agent to make the contract, but he must be an agent to sign it.

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Rule discharged.

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THE first count of the declaration stated, that before and at the time of the committing of the grievances, &c., the

By the "Man-
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Act, 1847," subject to the restrictions and provisions in that Act contained, the corporation were empowered to construct a reservoir and intercept the waters of the river Etherow for the purposes of the Act. By section 45, they were not to divert the water of the Etherow until a reservoir should be completed and filled with water. By section 46, they were required to discharge out of the said reservoir sixty cubic feet per second for twelve hours of every working day. By the "Manchester Corporation Waterworks Amendment Act, 1848," sect. 12, in lieu of sixty cubic feet, seventy-five cubic feet per second were to be discharged. By section 15, in case of any failure, neglect or default by or in consequence of which the quantity of water required by that Act to flow or be discharged over the guage should not so flow, the corporation were to forfeit 50*l.*, by way of penalty, to the occupiers of certain mills. And by section 17, it was enacted that it should not be lawful for the corporation to use or appropriate any water flowing to the river Etherow until they should have secured and commenced to discharge the stipulated quantity of seventy-five feet per second.

The corporation made a reservoir which from engineering difficulties was never completed, as required by the Act of 1847, or with the additions imposed by the Act of 1848, so as to be filled with water or capable of being filled with water; and water had not been discharged therefrom in the quantity and manner required by the Acts, or in any larger quantity; but in 1857 they diverted the water of the Etherow for the supply of the inhabitants within the limits of the Acts, and since that time have discharged certain quantities of water from the reservoir during twelve hours of every day.

In 1860 the plaintiff, a millowner on the Etherow, brought an action against the corporation. The declaration contained counts for wrongfully diverting the waters of the Etherow, and also counts for not discharging a quantity of water equal to seventy-five cubic feet per second for twelve hours of every working day. The defendants paid money into Court as to the former counts, and to the latter pleaded that they had not completed the reservoir and works mentioned in the Act, so as to make it their duty to discharge water at the rate specified.—*Held*, that the plea was good; that the defendants were not estopped from setting up the non-completion of the reservoir, and that the plaintiffs were only entitled to damages for the loss of the natural flow of the waters of the Etherow, and not for the non-discharge from the reservoir of the seventy-five cubic feet per second.

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plaintiffs were lawfully possessed of certain mills, &c., and, by reason of the possession thereof, the plaintiffs before and at the time of the committing of the said grievances, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit of the water of a stream which had been used to run and flow, and at and during the said times ought to have run and flowed, and still of right ought to run and flow, to the said premises of the plaintiffs for supplying the same with water: Yet the defendants wrongfully and injuriously made and placed certain dams, weirs, &c., across and by the sides of and in the banks of the stream and higher up the same than the plaintiffs' premises, and wrongfully, &c., kept and continued the same, and thereby wrongfully, &c., stopped, diverted, and drew off, and penned and dammed back, the water of the stream, and prevented the same from flowing down to the said mills, &c.

Second count.—That, before and at the times of the passing and coming into operation of the "Manchester Corporation Waterworks Act, 1847," and the "Manchester Corporation Waterworks Amendment Act, 1848," and the days and times of committing the grievances hereinbefore mentioned, the plaintiffs were lawfully possessed of certain mills, &c., and by reason of the premises of right ought to have had and enjoyed, and still of right ought so to do, the benefit of the waters of, and the waters flowing and passing into the river Etherow, and mentioned in the 45th section of the said Act of 1847, which had been used to run and flow, and still of right ought to run and flow to the said premises of the plaintiffs for supplying the same with water: Yet the defendants, after the passing and coming into operation of the "Manchester Corporation Waterworks Act, 1847," and of the "Manchester Corporation Waterworks Amendment Act, 1848," did, on very many days and times before this suit, wrongfully, unlawfully and injuriously, and contrary to the provisions of the said 45th section and other the provisions

of the said Acts, use, divert, interfere with, detain and appropriate for the supply of the inhabitants within the limits of the said Acts, certain water which, at the time of the passing of the said Acts, did flow and pass, and which but for the passing of the said Acts would have flowed and passed into the said river Etherow, and being certain of its waters mentioned in the said 45th section; although, on the said days or times or any of them, the reservoir by the said Acts required to be completed before using, diverting, interfering with, detaining or appropriating the said waters for the purpose aforesaid, had not been so completed, nor had the same been filled with water, and water had not been and was not discharged therefrom in the quantity and manner in that behalf provided by the said Acts, nor in any other quantity and manner by the said statutes or otherwise made lawful or sufficient, contrary to the provisions of the said statutes, and thereby on the said days and times of committing the said grievances, the water of the said river and waters which at the time of passing the said Acts did flow and pass, and which but for the wrongful acts aforesaid would have flowed and passed into the said river and down to the plaintiffs' said premises, were prevented from so flowing, &c.

Third count.—That, before and at the times of committing the grievances in this count mentioned, the plaintiffs were lawfully possessed of mills, &c., situate on and immediately adjoining the river Etherow, and being some of the mills and works on the river Etherow in the preamble of the 12th section of the "Manchester Corporation Waterworks Amendment Act, 1848," referred to; that after the passing and coming into operation of the said Acts of 1847 and 1848, the defendants at all times became and were empowered to carry the said Acts and the provisions thereof into execution, and the defendants under colour of the said Acts used,

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repairing or keeping the same in repair, or other lawful purpose, &c.

Fourth count.—That at the time &c. the plaintiffs were possessed of mills, &c., situate on the river Etherow, in the preamble of the 12th section of the said Act of 1848 referred to; that, after the passing and coming into operation of the said Acts of 1847 and 1848, the defendants at all times became and were empowered to carry the said Acts and provisions thereof into execution. And the defendants, under colour of the said Acts, used, diverted, interfered with, detained and appropriated for the supply of the inhabitants within the limits of the said Acts, certain of the waters of the river Etherow; and under colour of performance of, and obedience to, the provisions of the 45th and 46th sections of the Act of 1847, and the provisions of the Acts of 1847 and 1848 in that behalf applicable, made certain reservoirs for the supply of the mills and works on the said river Etherow; and all things happened and took place necessary to make it to be, and it became and was, at and during the times of committing the grievances hereinafter mentioned, &c., the duty of the defendants to cause a quantity of water equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged, as by the said 12th section of the said Act of 1848 provided.—Breach: that the occupiers of the said seven mills in the same section mentioned, or a majority of them, did not make or come to any such determination as in the said 12th section of the Act of 1848 is mentioned, of which the defendants had notice, yet the defendants violated the provisions of the said Acts, and neglected to cause, and did not cause, the prescribed quantity of water to be discharged, nor was the same discharged, as required by the 12th section of the Act of 1848, on default of such determination by the said occupiers, &c.

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Pleas (inter alia.)—First, as to the first and second counts, payment into Court of 1s. Secondly, as to the third and fourth counts: not guilty. Fifthly, as to the same counts, that the defendants have not made and completed the reservoir and works by the said acts of parliament required, so as to make it the duty of the defendants to cause a quantity of water equal to seventy-five cubic feet of water per second, for twelve hours of every working day, to be discharged. Seventhly, to the same counts, leave and licence.

The plaintiffs replied to the first plea, that the money brought into Court was not sufficient to satisfy the plaintiffs' claim, and took issue on the other pleas.

They also demurred to the fifth plea, and the defendants joined in demurrer.

The issues in fact came on for trial, when by consent a verdict was returned for the plaintiffs, subject to a special case, in substance as follows,—

The plaintiffs are the lessees and occupiers of land and a water mill and works near Glossop, on the river Etherow, known as the Bank Wood Mill; wherein, before the diversions complained of, they carried on the business of cotton spinners.

The river Etherow commences its course at Woodhead, above the plaintiffs' mill.

During the time mentioned in the pleadings (except so far as the working was prevented by the diversions) the said mill was worked by the plaintiffs, by day and by night, by means of the water of the river.

Before the plaintiffs became the occupiers, and before and at the time of the passing of the Act of 1847, a water mill and works, situate on the site of the said mill and works of the plaintiffs, had been in like manner, to the extent which the natural flow of the river which was con-

stantly varying, permitted, worked by means of the water of the river which then flowed uninterruptedly by day and by night.

In 1849 the plaintiffs became the lessees of the said works, and made alterations, and erected additional water wheels and machinery to enable them to make use of the daily supply secured by the Acts of 1847 and 1848.

By the Manchester Corporation Waterworks Act, 1847 (a),

(a) 10 & 11 Vict. c. cciii.—“An Act to enable the mayor, aldermen and burgesses of the borough of Manchester, in the county of Lancaster, to construct waterworks for supplying the said boroughs, and several places on the line of the said intended works, with water and for other purposes.”

Section 35 enacts, “That, subject to the restrictions and provisions in this Act and in the Act incorporated herewith contained, it shall be lawful for the mayor, &c., to make, construct and maintain (inter alia a reservoir at Woodhead) for the purpose of collecting and storing up the waters of certain springs, brooks, rivulets, streams,” &c.

Sect. 36.—“That, subject as aforesaid, it shall be lawful for the mayor, &c., from time to time, to take and store up in the said reservoirs, so to be constructed as aforesaid, &c., the waters” of the river Etherow, &c., “and from time to time to draw off and use the waters so stored up for the purposes of this Act,” &c.

Sect. 45.—“That the mayor, &c., shall not use, divert, interfere with, detain or appropriate, for the supply of the inhabitants

within the limits of this Act, any of the waters which now flow or pass, or which but for the passing of this Act would have flowed or passed into the river Etherow, unless and until the reservoir delineated on the said plans and described thereon, called ‘The Compensation Reservoir,’ shall be completed and filled with water, and water be discharged therefrom in the quantity and manner hereinafter provided.”

Sect. 46.—“That the mayor, &c., shall and they are hereby required to discharge from and out of the said Compensation Reservoir on each and every working day, for the supply of the mills and works on the said river Etherow, a quantity of water equal to sixty cubic feet per second for twelve hours of every working day, commencing, continuing and terminating at and during such hours as shall from time to time be determined by the occupiers of the several mills and works hereinafter mentioned.”

By sect. 47, Gauges and other works are to be constructed for the purposes of ascertaining the actual quantity of water passing out of the Compensation Reservoir.

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the mayor, aldermen, and burgesses of Manchester (whose title was afterwards, by charter, changed to that of the mayor, aldermen, and citizens of the city of Manchester), were authorized to make certain reservoirs upon the river Etherow.

The mills and waterworks specified in the 49th section of the Act of 1847 did not include the plaintiffs' mills, or those of various other millowners on the river Etherow. By the Manchester Corporation Waterworks Amendment Act, 1848, (a),

By sect. 48, The occupiers of the said mills are to have access to the guages.

By sect. 49, The occupiers of *seven named* mills are empowered to meet and determine the hours and rate of discharge.

Section 50 imposes a penalty, "in case of any failure, neglect or default, by or in consequence of which the quantity of water required to flow or be discharged from and out of the said Compensation Reservoir as aforesaid, shall not so flow or be discharged therefrom."

Section 55.—"That nothing in this Act contained shall be construed to affect, diminish, prejudice or alter in any manner whatsoever any right which, before the passing of this Act, the owners, lessees or occupiers of any lands, mills or works, or of any of the rivers, streams or brooks authorized to be taken or used for the purposes of this Act, had or have possessed, &c., to the use of the waters of the said rivers, &c., except so far as is herein expressly provided."

(a) The 11 & 12 Vict. c. cī.—
 "An Act to amend and enlarge

the powers and provisions of the Manchester Corporation Waterworks Act, 1847."

By sect. 3, The Corporation were empowered to enlarge the Woodhead Reservoir and make two other reservoirs on the Etherow at Torside and Rhodes Wood.

Section 12, reciting that by the Act of 1847, the mayor, &c., were required to discharge out of the Compensation Reservoir on each working day sixty cubic feet per second, &c., and that it is "expedient that the quantity of water to be discharged from the said reservoir should be increased," enacts "that in lieu of the quantity of water by the recited Act required to be discharged from the said reservoir, the mayor, &c., shall and they are hereby required to cause a quantity of water equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged through or over a guage at or near a weir across the said river Etherow, &c., such discharge to be made at such a rate, in such manner, at such times, and in such proportions as the occu-

it was provided that the provisions of the Act of 1847, except where altered or repugnant, should extend to that Act. After the passing of the said Acts the defendants commenced erecting the works thereby authorized, and in September, 1851, and at all times thereafter, they diverted and appropriated, for the supply of the inhabitants within

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piers of" (the seven named mills) "or a majority of them shall determine, as in the said recited Act mentioned, and in default of any determination by the occupiers of such mills and works, as in the said Act mentioned, then and in such case the said mayor, &c., shall and they are hereby required to cause to be discharged from the said reservoir, at or near Rhodes Wood aforesaid, not less than seventy-five cubic feet per second continuously during twelve hours of every working day, commencing at half-past five o'clock in the morning."

Section 14 repeals the penalty given by the 50th section of the former Act.

Sect. 15.—Be it enacted, "that in case of any failure, neglect or default by or in consequence of which the quantity of water required by this Act to flow or be discharged through or over the said gauge lastly hereinbefore mentioned as aforesaid, shall not so flow or be discharged, the mayor, &c., shall, for and during every day on which such failure, neglect or default shall occur, forfeit and pay by way of penalties to the occupiers of the Hollingworth Print Works, the Comp-stall Mills, and of each of the said

several mills and works affected thereby and mentioned in the said recited Act, who shall actually have received damage or incurred any loss by reason of such failure, neglect or default as aforesaid, and who may sue for and recover the same, the sum of fifty pounds."

By section 17, "It shall not be lawful for the mayor, &c., or any person acting under their authority, or under the powers and provisions of this or of the said recited Act, to use or appropriate, for the supply of the inhabitants or others within the limits of this or the said recited Act, any water now flowing or which may flow to or upon the site of the said reservoir at or near Woodhead, or any water now flowing or which may flow into the river Etherow, between the intended site of the said last mentioned reservoir and the Vale House Weirs, until the said mayor, &c., shall have secured to the said several occupiers of the said mills and works, and commence to discharge through or over the said gauge hereinbefore particularly referred to, the said stipulated quantity of seventy-five cubic feet per second for twelve hours of every working day, in manner hereinbefore provided."

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the limits of their Acts, a considerable part of the waters of, and which but their works would have flowed into, the Etherow.

The Compensation Reservoir, though apparently completed by the defendants, has from engineering difficulties not been completed as required by the Act of 1847, or with the additions and alterations authorized by the Act of 1848, or otherwise, so as to be filled with water, or so as to be capable of being filled with water, nor has the same been filled with water, nor has water been discharged therefrom in the quantity and manner provided by the said Act of 1847, or in any larger quantity.

In like manner, the Torside and Rhodes Wood Reservoirs, though apparently completed by the defendants have not nor has either of them, from the like engineering difficulties, been so completed, as to be filled with water, or to be capable of being filled with water, nor has water been discharged from the same or either of them in the quantity provided by the said Act of 1848.

No determination by the occupiers of the mills and works specifically mentioned in the 12th section of the Act of 1848, or a majority, as to the discharge of the water, has been come to.

The defendants have during twelve hours or upwards of every working day discharged over a guage, at or near the place mentioned in section 12, certain quantities of water; but they have not, except in cases of floods, caused to be discharged from the said reservoirs, or any of them; nor have they ever, except in cases of floods, caused to be discharged into the said river Etherow over the said guage, from any other reservoir or place, a quantity of water equal to seventy-five cubic feet of water per second continuously during twelve hours of every working day.

Since the month of September, 1857, no water intercepted

by the defendants has been discharged by them by night, or, except in floods, flowed by night into the channel of the river Etherow. Of the mills mentioned in the 49th section, some are situate above, some below the plaintiffs' mill.

The plaintiffs seek to recover on the several counts of the declaration in respect of damage sustained, down to the commencement of the action, by reason of the loss of water by night, and not receiving as much water by day as they have been and are entitled to, &c. The Court are to have power to draw inferences of fact.

The Court are to decide whether the plaintiffs are entitled to recover on the 3rd and 4th counts, or one of them, and, if they are, whether the plaintiffs are entitled to recover damages on the 1st and 2nd counts, and also on the 3rd and 4th counts, or are bound to elect on what counts they will assess their damages, &c.

Manisty (with whom was *Aspland*) argued for the plaintiffs.—By the 35th section of the Manchester Corporation Waterworks Act, 1847, subject to the restrictions and provisions in that Act contained, the Corporation were empowered to make, construct and maintain reservoirs, &c., for the purpose of collecting and storing up the waters of certain streams, and amongst others, by section 36, the waters of the river Etherow. Section 45 enacts, that they shall not divert, for the supply of the inhabitants within the limits of the Act, any of the waters which flow into the river Etherow, unless and until the Compensation Reservoir be completed and filled with water, and the water discharged therefrom in the quantity and manner therein-after provided. By section 46, they are to discharge, for the supply of the mills on the river Etherow, a quantity of water equal to sixty cubic feet per second, for twelve hours of every working day, commencing, continuing and terminating at such hours as shall be determined by the occu-

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ment of the several mills and works therein mentioned. Section 23 provides that the occupiers of the mills shall from time to time meet and determine the times and rate of discharge. Section 24 provides that, in case of any failure, neglect, or default by or in consequence of which the quantity of water required to flow or be discharged from and out of the Compensation Reservoir, shall not as flow or be discharged therefrom, the corporation shall, for every day in which such failure, neglect or default shall occur, furnish to the occupiers of each of the several mills 300. By section 25, nothing in the Act contained is to prejudice any rights which, before the passing of that Act, the owners of any lands, mills or works had in the use of any of the streams authorized to be taken. By the "Manchester Corporation Waterworks Amendment Act, 1843" (11 & 12 Vict. c. 21, s. 12, in lieu of the quantity of water by the former Act required to be discharged from the Compensation Reservoir, the corporation are required to cause a quantity of water equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged. The 14th section repeals the 5th section of the former Act; and section 15 imposes a penalty of 50*l.* on failure to supply the stipulated quantity of water. The 17th section enacts, that it shall not be lawful for the corporation to use or appropriate the waters there mentioned, until they have commenced to discharge over the gauge the stipulated quantity of seventy-five cubic feet per second. The question is, whether the plaintiffs have acquired a right to the quantity of water mentioned in the 12th section. The millowners had a right to the water of the Etherow, until they got the new supply. [Meilish.—The defendants have paid 1*l.* into Court on the first two counts. They admit that they have acted illegally, and that the plaintiffs are entitled to damages on that footing: but the Act goes on to provide that, in lieu of the original stream, the cor-



poration are to send into the Etherow seventy-five cubic feet per second, for twelve hours of every working day. During the remaining twelve hours, they may stop the supply. The question is, whether the right of the mill owners to a supply from the reservoir upon that footing had accrued. The plaintiffs' contention is, that they are entitled to damages for the loss of the natural flow of the water as well as of the substituted stream of seventy-five cubic feet per second over the weir. The defendants' contention is that, the right to divert the natural stream never having come into existence, the obligation to send the seventy-five cubic feet per second over the weir never arose. In any case, the plaintiffs cannot be entitled both to the natural stream and that which is to be substituted for it, but must elect between the two.] The plaintiffs have a right to claim damages for the loss of the natural flow of the stream, up to the period when the defendants commenced discharging water out of the Compensation Reservoir, and damages for not discharging seventy-five cubic feet per second, from the time when they appropriated the stream and completed the reservoir, apparently, as a Compensation Reservoir. [*Pollock*, C. B.—The defendants have not completed their works.] It is enough that they have, *apparently*, completed them. Upon the true construction of the Acts, the obligation to discharge seventy-five cubic feet per second does not arise until they are in a condition to discharge such a quantity of water: on the contrary, it is expressly provided that they are not to appropriate any water flowing into the river Etherow until they have secured this discharge: 10 & 11 Vict. c. cciii., s. 45; 11 & 12 Vict. c. ci., s. 17. [*Pollock*, C. B.—The plaintiffs might have proceeded by mandamus or injunction: but, in an action for damages, the damage which the plaintiffs are entitled to recover is that occasioned by the

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wrongful act done, and that, in this case, seems to be the loss of the natural waters of the Etherow.] If there was a time at which the defendants were bound to discharge a specific quantity of water, and they have not done so, the plaintiffs are entitled to damages for the loss of that water. The defendants have made a reservoir, and they cannot set up that they have done so insufficiently. [*Bramwell*, B.—Suppose they had never made any reservoir, would they have been estopped from saying that?] In such a case the plaintiffs would, probably, have a right to turn on the water which the defendants had diverted; but it has been said, in this Court, that where works have been executed, although improperly, under statutory powers, another party cannot abate them. [*Pollock*, C. B.—I should assent to your contention, that the defendants cannot set up the insufficiency of the reservoir, if the Act had provided that the corporation should certify, as, for instance, to the Sessions, that they had made the reservoir, and they had certified to that effect.] They have completed the reservoir, and dealt with it as if it were complete for one purpose, and, therefore, they cannot now be heard to say that it is not complete.

*Mellish* (with whom was *Monk*), appeared to argue for the defendants, but was stopped.—[*Martin*, B.—The case finds that the Compensation Reservoir, though apparently completed by the defendants, has, from engineering difficulties, not been completed as required by the Acts of 1848, or otherwise, so as to be capable of being filled with water &c. The facts are either against the plaintiffs, or the statement is unintelligible.]

POLLOCK, C. B.—We are all of opinion that the plaintiffs are not entitled to recover damages under the third



and fourth counts of the declaration. After the passing of the Acts the defendants found that they could not complete the reservoir. The millowners did not think fit to interfere by mandamus or injunction, but suffered the defendants to intercept the water without interruption for a period exceeding six years. Under these circumstances we think that the plaintiffs are only entitled to damages for the loss they have sustained by getting less water than they would have had if the natural stream of the Etherow had not been interfered with; and that the defendants are not bound to pay for the non-supply of the water from the reservoir as if they had completed the works, and wrongfully withheld the water.

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MARTIN, B.—It is not necessary for me to say more than that the fifth plea is proved; viz., that the defendants had not made and completed the reservoir and works, so as to make it the duty of the defendants to cause seventy-five cubic feet per second to be discharged; and that it is a good plea.

BRAMWELL, B.—The question is whether the plaintiffs are entitled to recover on the fourth count. I think that they are not. The fourth count alleges that the defendants, under colour of the Acts, used, diverted, interfered with, detained and appropriated, for the supply of the inhabitants within the limits of the Acts, certain of the waters of the Etherow, and, under colour and in obedience to the provisions of the 45th and 46th sections, &c., made certain reservoirs for the supply of the mills and works on the Etherow, and it became the duty of the defendant to cause a quantity of water equal to seventy-five cubic feet per second, for twelve hours of every working day, to be discharged, and the breach is, that the defendants did



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not cause the prescribed quantity of water per second to be discharged. The fifth plea is that the defendants had not made and completed the reservoir and works by the said acts of parliament required, so as to make it the duty of the defendants to cause a quantity of water equal to seventy-five cubic feet per second to be discharged. The question is whether the allegation so traversed is made or in fact. The case shews that it is not. The plaintiffs contend that, as the defendants had no right to divert the water unless they had completed the reservoir, they are precluded from saying that they have diverted it wrongfully. If it was known to everybody that the defendants had tried to make the reservoir, and failed, they would not be estopped from saying so. I can easily understand that, if the plaintiffs had gone to the defendants, and asserted a right to the natural flow of the stream at common law, and the defendants had said, "your common law right is gone, you must claim under the statute," then they might have been estopped. There is another difficulty in the plaintiffs' way. Assuming for a moment that they had a right to say that the defendants are estopped: in the declaration they have chosen to treat the defendants as wrong doers. The defendants must be entitled to say, "True, we are so." Assuming then that the plaintiffs had the option before, by the mode of pleading they gave the defendants the option. The plaintiffs, therefore, cannot get damages on the third and fourth counts, but only for the injury to their common law right.

Judgment for the defendants on the special case, the plaintiffs not being entitled to recover on the third and fourth counts of the declaration.



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## CHAMP v. STOKES.

May 2.

**D**ECLARATION, for work and materials, money paid and money due on accounts stated.

Pleas.—First: Never indebted. Secondly: That the action was brought for the recovery of fees, charges and disbursements, for business done by the plaintiff as an attorney for the defendant, and that no signed bill was delivered as required by the 6 & 7 Vict. c. 73.—Issues thereon.

At the trial, before *Willes, J.*, at the last Wiltshire Spring Assizes, the following facts appeared.—The plaintiff was an attorney at Newport, in Monmouthshire, and he had a branch office at Cardiff, in Glamorganshire. The defendant was a farmer residing in the parish of Lanphey, in Glamorganshire, and surveyor of the highways of that parish. In the year 1857, an indictment for the non-repair of a highway was preferred and found against the inhabitants of Lanphey, and at a vestry meeting called by the defendant on the 24th December, 1857, it was unanimously resolved to defend the indictment. The defendant consulted the plaintiff on the subject, and numerous letters passed between them, the result being that the defendant retained the plaintiff to conduct the defence on behalf of the parish. The indictment was tried at the assizes, and a verdict of guilty returned. Pending the proceedings the defendant ceased to be surveyor, and a new surveyor was appointed in his place. Another long correspondence ensued between

The defendant, the surveyor of highways of the parish of L., retained the plaintiff to defend an indictment against the parish for the non-repair of a highway. Pending the proceedings, the defendant ceased to be surveyor, and a new surveyor was appointed. In a correspondence between the defendant and plaintiff as to the costs of the indictment, the defendant requested the plaintiff to send his bill of costs to the new surveyor. The plaintiff sent by post his bill of costs to the defendant in the following letter:—  
“Herewith you have my bill of costs in the L. matter. I have sent a copy to the

surveyor of the parish of L.” The bill was headed “The surveyor of the highways of the township of L., and the inhabitants of the said parish, debtors to C.” (the plaintiff).—*Held*, that as the 6 & 7 Vict. c. 73, s. 36, does not require any heading to an attorney’s bill, the requisites of that statute were complied with, since the bill and the letter sufficiently notified to the defendant that he was the party to be charged.



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the defendant and plaintiff as to the costs of the indictment, the vestry being unwilling to levy a rate to defray them, and the defendant requested the plaintiff to send his bill to the new surveyor. On the 15th of September, 1858, the plaintiff sent by post his bill of costs to the surveyor, inclosed in the following letter:—

“To the surveyor of the highways of the parish of  
 Lanphey.

“Sir,                      “St. Bride’s Major, near Bridgend.

“Herewith I beg to send you my bill of costs, amounting to 101*l.* 3*s.* 10*d.* You will be good enough, if you have not sufficient funds in hand, to call a vestry meeting, and make a special rate to meet my bill. I suppose you have repaired the highway: if not, let it be done at once, and send me a certificate to enable me to report to the Court of Queen’s Bench.”              “Yours truly

“Aug. B. Champ.”

The bill of costs was headed as follows:—

“The surveyor of the highways of the township of Lanphey, and the inhabitants of the said parish, debtors to Aug. B. Champ, solicitor, Newport, Monmouthshire.

“The Queen on the prosecution of R. Franklin, Esqr., against the inhabitants of the township of Lanphey, for a defective highway.

“Bill of costs of Augustus Bertram Champ, attorney for the defendants, Glamorganshire General Quarter Sessions.”  
 —(Then followed the items, amounting to 101*l.* 3*s.* 10*d.*)

The plaintiff also sent by post a copy of his bill to the defendant, inclosed in the following letter:—

“Mr. C. Stokes.                      “15th Sept., 1858.

“Dear Sir,

“Herewith you have my bill of costs in the Lanphey matter, amounting to 101*l.* 3*s.* 10*d.* I have not included the witnesses; but Mr. E. Griffith’s claim is about 12*l.* I



have sent a copy to the surveyor of the highways of the parish of Lanphey.

"Yours truly

"Aug. B. Champ."

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The defendant subsequently wrote to the plaintiff, and acknowledged the receipt of the bill and letter.

It was objected on behalf of the defendant, first, that he was not personally liable to the plaintiff; and, secondly, that there was no sufficient delivery of a signed bill, as required by the 6 & 7 Vict. c. 73, s. 37.

The learned Judge left it to the jury to say whether the defendant had retained the plaintiff, and they found a verdict for the plaintiff for 53*l.* 13*s.* 4*d.* (the amount at which the bill had been taxed) and leave was reserved to the defendant to move to enter a nonsuit.

*Karslake*, in the present Term (April 23), obtained a rule nisi accordingly, against which

*Coleridge and Kingdon* now shewed cause.—First, there was a sufficient delivery of a signed bill, within the meaning of the 6 & 7 Vict. c. 73, s. 37. It is objected that the bill is improperly headed, inasmuch as "the surveyor of highways" means the then surveyor, but the heading is sufficient to point out the defendant as the party charged. In *Daubney v. Phipps* (a) the action was against one of the managing committee of the "Northampton, Lincoln and Hull Railway Company," provisionally registered, for work done by the plaintiff as an attorney, and a bill headed "Northampton, Lincoln and Hull Railway, to Robert Heaford Daubney, Dr." was held to be sufficient. Here there was a sufficient delivery of the bill; it was inclosed in a letter addressed to the defendant, and the receipt of which he acknowledged: *Eggington v. Cumberland* (b). The head-

(a) 16 Q. B. 504. 514.

(b) 1 Exch. 271.



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ing would have been sufficient even if the bill had not been addressed to any one, for the bill and the letter, taken together, notified to the defendant that the plaintiff meant to charge him: *Roberts v. Lucas* (a). [*Wilde, B.*—The plaintiff, in his letter to the defendant, says that he has sent him his bill, and a copy to the surveyor]. The copy was sent to the new surveyor, at the defendant's express request. *Mant v. Smith* (b) is also an authority that this bill is sufficient. Moreover the heading is mere surplusage, for the statute does not require any. Secondly, the defendant is personally liable.

The Court then called on

*Karslake*, to support the rule.—It is true that the statute does not require any particular form of heading to the bill, but the bill or the letter must notify to the person to whom they are sent that he is the party charged. Here the heading of the bill notifies, not that the defendant, but the surveyor of highways, or the inhabitants of the parish, are the persons charged. There is no authority that, under the circumstances of this case, the requirements of the statute have been complied with.—He also argued that the defendant was not personally liable.

*POLLOCK, C. B.*—The rule ought to be discharged. Looking at all that passed between the parties, the defendant could have had no doubt that the plaintiff looked to him as the person liable to pay the bill. No heading is required by the statute, and, even if there had been none, the defendant must have known that he was the person charged; therefore the heading could not have misled him. As to the other point, it was a question for the jury, and they have determined it.

(a) 11 Exch. 41.

(b) 4 H. & N. 324.



MARTIN, B.—I am of the same opinion. The legislature has thought fit to make an enactment, with respect to an attorney's bill, providing that certain things shall be done by him before he can recover his costs, and we ought to carry out that enactment. But if, in a case like this, the attorney is not entitled to maintain the action, he would be in a condition far beyond what the statute intended. The bill was headed "The surveyor of the highways of the township of Lanphey, and the inhabitants of the said parish," and entitled in the matter of the business done; it was sent to the defendant in a letter signed by the plaintiff, and referring to the bill. Now, the statute enacts that no attorney or solicitor shall commence or maintain any action or suit for the recovery of charges, fees or disbursements until the expiration of a month after he shall have delivered, or sent by post, to the party to be charged therewith, a bill of such charges, which shall either be subscribed with his hand, "*or be enclosed in or accompanied by a letter subscribed in like manner, referring to such bill.*" There is not one word about heading the bill. It is to be delivered or sent to the party to be charged. Here it has been sent to the party called upon to pay. It is true that the plaintiff, at the request of the defendant, sent a copy of the bill to the new surveyor, but great injustice would be done if that was to preclude him from recovering the amount from the defendant. Suppose an attorney sent his bill to his client, and the latter insisted that he was not liable to pay it, and requested the attorney to send the bill to A. B., and the attorney afterwards said "I have sent a copy of the bill to A. B., but you are the person to whom I look for payment;" what is there to prevent him recovering the amount? We ought to take care that all parties have the benefit of this statute. Here the plaintiff has done all that the statute requires; he has sent

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his bill in a signed letter, intimating that the defendant was the person whom he considered liable to pay it. With respect to the other point, it was a question for the jury, and they have determined it.

BRAMWELL, B.—I agree with my brother *Martin* that it is desirable that we should not encourage special demurrers to attorneys' bills of costs. The statute requires that the bill shall be delivered, or sent to the party to be charged. Here, on the face of the bill and letter, the defendant is the party charged. In *Grinley v. Austen (a) Patteson, J.*, said: "I think that the attorney ought to shew whom he means to charge with his bill." I also think he ought. But here there is no doubt that the letter and bill sufficiently intimate to the defendant that he is the party charged.

WILDE, B.—I have not heard the whole of the argument; but, so far as I have heard it, I agree with the rest of the Court.

Rule discharged.

(a) 16 Q. B. 504. 512.

April 23.

KILLIGREW v. PETERS.

On motion for a rule nisi for a new trial, in a case tried before the sheriff, under a writ of trial, the sheriff's

notes must be produced, unless good cause be shewn to the contrary; and it is not a sufficient excuse for their non-production that the motion is made by the counsel who was engaged at the trial, and is prepared to state what occurred.

*BALLANTINE*, Serjt., moved for a new trial in this case, which was tried, upon a writ of trial, before the Secondary of London, when a verdict was found for the plaintiff for 13*l*.



The Court having asked for a copy of the Secondary's notes of the trial,

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*Ballantine*, Serjt., submitted that in this case it was not necessary to produce them on moving for the rule nisi, since he had been counsel for the defendant at the trial, and was prepared to state what had occurred on that occasion. He referred to Chitty's Archbold's Practice, vol. 1, p. 406, 10th ed., where it is said: "If the motion be made by counsel engaged at the trial, the Court will not require the production of the sheriff's notes or an examined copy of them, upon the motion for a rule nisi:" citing *Flower v. Adams* (a), *Reynolds v. Stone* (b), and *Barnett v. Glossop* (c).

Per CURIAM (d).—We think that in this case the Secondary's notes ought to be produced. As a general rule, the notes must be produced unless good reason be shewn to the contrary, as, for instance, if there be some difficulty in obtaining them; but we think it is not a sufficient excuse for not producing them that the motion is made by the counsel who was engaged at the trial, and is prepared to state what occurred.

The motion was then adjourned for the production of the notes.

(a) 8 Dowl. P. C. 292.

(b) 1 Dowl. P. C., N. S. 578.

(c) 3 Dowl. P. C. 625.

(d) *Pollock*, C. B., *Martin*, B.,  
*Bramwell*, B., and *Wilde*, B.



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May 2.

OXENHAM v. SMYTHE.

A count of a declaration stated that the plaintiff was tenant to C. of a public house, and also owed her money; that C. had seized, as a distress for arrears of rent, certain goods of the plaintiff; and thereupon the defendant, representing and pretending that he authorized by C. to act as her attorney in that behalf, and as such attorney to enter into the agreement thereafter mentioned in her behalf, it was agreed between the plaintiff and defendant,

as such attorney on behalf of C., that for the consideration in the agreement mentioned, C. would withdraw the distress and take no proceedings for the recovery of the arrears of rent for six months. The declaration then stated that, although the plaintiff performed his part of the agreement, the defendant, representing and pretending that he was authorized as attorney for C. so to do, did, in the name of C., take proceedings for the residue of the arrears of rent within six months, and in violation of the agreement did, as such attorney, in the name of C., distrain for the residue of the arrears of rent the plaintiff's goods and chattels. By means whereof the plaintiff was not only prevented from carrying on his business as a publican, but lost divers gains and profits. That the plaintiff trusting in the said representations of the defendant, and believing that the defendant was so authorized as aforesaid by C. to act, and that he did act as attorney on her behalf, as well as to enter into the said agreement, as to putting in the said distress in violation thereof, sued C. in an action of trespass, and at the trial the plaintiff was nonsuited by reason of the defendant not having been authorized by C., and by reason of the defendant, who was called as a witness on the trial by the plaintiff to prove the authority of C. to the defendant to put in the distress and to enter into the agreement on her behalf, denying any authority from C. to him, as her attorney, either to put in the distress or enter into the agreement on her behalf: Whereby and by reason of the premises, the plaintiff expended and became liable to pay large sums of money for costs. On demurrer:—*Held*, that the count was bad for not distinctly averring that the defendant was not authorized by C. to act on her behalf.

**THIRD** count.—The declaration stated that, before the making of the agreement hereinafter mentioned, one Esther Collins was the proprietor of a certain brewery called "The Richmond Brewery," and the plaintiff was tenant to the said Esther Collins of a certain public house, called "The Cricketers," situate at Richmond Green, at a yearly rent of 50*l.*, payable quarterly; and the plaintiff was also indebted to the said Esther Collins in a certain sum of money, exceeding the sum of 30*l.*, for certain arrears of the said rent; and also in a further sum of money, also exceeding the sum of 30*l.*, for a certain book debt for beer and other goods sold and delivered by Esther Collins as proprietor of the said brewery to the plaintiff. And the said Esther Collins had seized as a distress for the said arrears of rent certain goods and chattels of the plaintiff, then being in and upon the said premises, and had placed a man in and upon the said premises to keep possession of the said goods and chattels so seized as aforesaid. And the plaintiff



had informed the said Esther Collins that he, the plaintiff, was desirous of obtaining six months time to enable him to dispose by sale or otherwise of his interest in the said premises, in order to free himself from his said embarrassments and debts; and thereupon the defendant, being an attorney, and representing and pretending that he was authorized by the said Esther Collins to act as her attorney in that behalf, and as such attorney to enter into the said agreement hereinafter mentioned on her behalf, it was on, &c., agreed by and between the plaintiff and the defendant, as such attorney on behalf of the said Esther Collins, that in consideration that the plaintiff would, on the 4th day of January, 1859, pay the brokers' charges in the said distress, and also the sum of 2*l.* 2*s.*, for the costs of the defendant as the attorney of the said Esther Collins incurred in the said distress, and also the sum of 30*l.*, on account of the said book debt, and would also on the said 4th day of January give to the defendant as attorney for the said Esther Collins, a certain bill of exchange drawn by one W. Hammond and accepted by the plaintiff, dated the said 4th day of January, 1859, at three months after date, for the sum of 30*l.*, on account of the said rent so in arrear as aforesaid, she, the said Esther Collins, would forthwith withdraw the said man from possession of the said goods and chattels under the said distress, and not take any proceedings for the residue of the said book debt, nor for the residue of the said arrears of rent for the space of six months from the said 4th day of January, provided the said bill of exchange should be duly honoured. And the plaintiff says that though he did on the said 4th day of January duly pay the said monies and give to the defendant as attorney for the said Esther Collins the said bill of exchange according to the said agreement, and did all things necessary on his part to be performed and fulfilled; and although the said

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bill of exchange was duly honoured; yet the defendant representing and pretending he was authorized as attorney for the said Esther Collins so to do, did in the name of the said Esther Collins take proceedings for the said residue of the said arrears of rent within the space of six months from the said 4th day of January, and in violation of the said agreement and without the consent of the plaintiff, and within the space of six months, did as such attorney as aforesaid, in the name of the said Esther Collins, seize as a distress for the said residue of the said arrears of rent, the goods and chattels of the plaintiff then being in and upon the said premises, and also within the said space of six months, placed a certain man in and upon the said premises of the plaintiff, to hold possession of the goods so seized as last aforesaid, and kept and continued the said man so in possession as aforesaid in and upon the said premises for the space of thirty days. By means whereof the plaintiff was not only greatly harassed and incommoded in the occupation of the said premises, and hindered and prevented from carrying on his said business of a publican in as ample and beneficial a manner as he otherwise might and would have done, but has lost and been deprived of divers gains and profits which he otherwise would have derived and acquired in his said business of a publican; and has been prevented from completing an advantageous agreement for the sale of his interest in the said premises with one Jane Foster, and which said agreement with the said Jane Foster was known to the said Esther Collins before the said last mentioned distress was so put in as aforesaid. And the plaintiff says that, thereupon he the plaintiff, trusting in the said representations of the defendant, and believing that the defendant was so authorized as aforesaid by the said Esther Collins to act, and that he did act, as attorney on her behalf, as well as to enter



into the said agreement of the 4th day of January as to putting in the said distress in violation thereof as aforesaid, sued the said Esther Collins in this Honourable Court, in an action for breaking and entering into the said premises of the plaintiff, and converting and disposing of his said goods and chattels, and also for breach of the said agreement in this count mentioned, which action the said Esther Collins defended by the defendant as her attorney, and denied her liability therein, and which said action came on to be tried at the Surrey Assizes, at Kingston, on &c., when the plaintiff was nonsuited by reason of the defendant not having been authorized by the said Esther Collins as aforesaid, and by reason of the defendant, who was called as a witness on the said trial by the plaintiff to prove the authority of the said Esther Collins to him the defendant to put in the distress hereinbefore last mentioned, and to enter into the said agreement on her behalf, denying any authority from the said Esther Collins to him as her attorney, either to put in the said last mentioned distress, or to enter into the said agreement on her behalf, and judgment was afterwards signed against the plaintiff in the said action. Whereby, and by reason of the premises, the plaintiff has not only suffered the damage hereinbefore mentioned, but has also expended and has become liable to pay divers large sums of money amounting to 250*l.*, in unsuccessfully suing the said Esther Collins, and has also paid the further sum of 92*l.* 2*s.* 4*d.* to the said Esther Collins for costs in defending the said action.

The fourth count was substantially the same as the first, except that, instead of alleging that Esther Collins was landlady, it alleged that the defendant let the plaintiff into possession of the premises, representing that Esther Collins was landlady.

Demurrer to each count, and joinder therein.

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*Garth* argued in support of the demurrer in last Hilary Term (January 16).—These counts do not disclose any cause of action. The cause of action must be founded in tort or on contract. These counts are not in tort, because no fraud is alleged. Then, are they in contract? *Collen v. Wright* (a) decided that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. But if these counts are founded on that principle, they should have contained an express averment that the defendant was not authorized to act as the attorney of Esther Collins. No sufficient breach is alleged. The case resembles that of an action by lessor against lessee for not repairing, and in which, instead of alleging that the lessee did not repair, the lessor merely stated that the superior landlord brought an action against him in consequence of the lessee not repairing. There is no direct allegation as to the want of authority which the defendant could traverse. [*Pollock*, C. B.—A Court of law decides secundum allegata et probata; therefore the third count may mean only this,—that the plaintiff was nonsuited by reason of his not having *proved* that the defendant had authority to enter into the agreement.] It only means that the plaintiff was nonsuited by reason of it not appearing by the evidence that the defendant had authority.

*C. Wood*, in support of the counts.—*Randell v. Trimen* (b) is an authority in support of these counts. There the declaration stated that the defendant, who was employed as architect by A. and others to superintend the building of a church, falsely and fraudulently represented and pretended

(a) 8 E. & B. 647.

(b) 18 C. B. 786.



that he was authorized by A. to order, and did order, stone of the plaintiffs, for the building of the said church, for and on account of, and to be charged to A. ; and that the plaintiffs, relying on that representation, and believing that the defendant had authority from A. to order the stone on his account, delivered the same, and the same was used in the building of the church ; whereas, in truth and in fact, the defendant was not, as he well knew, authorized to order the said stone. The declaration then averred that, A. refusing to pay for the stone, the plaintiffs, trusting in the defendant's representations, sued A. for the price, and failed in their action, and had to pay A. costs, and also the costs incurred by their own attorneys. It was held that the declaration disclosed a good cause of action ; and, it appearing that the defendant had no such authority as he represented, that the plaintiffs were entitled to recover from him, not only the value of the stone, but also the costs they incurred and paid in the former action. [*Martin, B.*—That was not an action upon a contract, but for a false and fraudulent representation, and it was expressly averred that the defendant was not authorized to order the stone, and that he knew that the representation was false.] Here it is averred that the plaintiff was nonsuited by reason of the defendant not having been authorized by Esther Collins, as her attorney, to put in the distress, or enter into the agreement. That amounts to the distinct denial that the defendant had any authority. [*Pollock, C. B.*—Courts of justice do not proceed upon what is absolutely true or false, but upon what is made to appear by the evidence. A plaintiff does not recover a debt because the defendant owes him the money, but because the plaintiff proves that the defendant owes it. The meaning of this allegation is that the plaintiff was nonsuited by reason of its not appearing upon the evidence that the

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defendant was not authorized; it is not alleged as a positive fact that he was not authorized.] Upon general demurrer, the saying "by reason of the defendant not having authority" is equivalent to an averment that he had no authority. *Collen v. Wright* (a) shews that the plaintiff need not allege fraud. If the statement as to the plaintiff having been nonsuited be struck out, sufficient will remain to constitute a good cause of action, for it will appear that the defendant represented that he had authority, and then at the trial swore that he had no authority. [*Martin, B.*—By thus transposing the words the allegation would be right: "the defendant was not authorized by Esther Collins, by reason whereof the plaintiff was nonsuited."

*Garth* was not called upon to reply.

*Cur. adv. vult.*

POLLOCK, C. B., now said.—In this case there was a demurrer to the third and fourth counts. By those counts the plaintiff sought to recover damage resulting from a representation made by the defendant that he was authorized by one Esther Collins, of whom the plaintiff was tenant, to act as her attorney, in entering into an agreement, and putting in a distress upon the plaintiff's goods, when in point of fact he had no such authority. We are of opinion that those counts are bad in point of law, inasmuch as they do not distinctly and sufficiently state that the defendant was not authorized by Esther Collins to act on her behalf.

Judgment for the defendant.

(a) 8 E. & B. 647.



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JONES v. PRATT.

May 7.

THIS was an action for the infringement of a patent. Before declaration, the plaintiff took out a summons at Chambers for leave to deliver to the defendant interrogatories in writing. The application was supported by the affidavit of an agent of the plaintiff, who deposed that he "had been engaged for some time past in making inquiries with the view of ascertaining who were the persons who had made machines for the purpose of preparing, stubbing, roving, spinning, and doubling cotton, silk, wool, worsted, flax and other fibrous substances, such machines being infringements of the plaintiff's patent; that he had visited Manchester, Rochdale, &c., and other places for the purpose of ascertaining who were the persons who had infringed the plaintiff's patent; that he had seen several of the said machines at the said towns and places being infringements aforesaid, and had ascertained and believed that many of such machines, being infringements of the said patent of the plaintiff, had been made and sold by the defendant previous to June, 1845: that he believed that defendant had made a great many of such machines; and that it was absolutely necessary that the plaintiff should be at liberty to deliver interrogatories to the defendant previous to the delivery of a declaration in this action, as, if the defendant answered the interrogatories fully and faithfully, he verily believed the answers would disclose many more breaches of the patent than he or the plaintiff had yet discovered." There was also an affidavit of the plaintiff's attorney, in the terms prescribed by the 52nd section of the Common Law Pro-

In an action for infringement of a patent, the Court refused to allow the plaintiff to administer interrogatories to the defendant before declaration, it appearing that the cause of action arose more than six years before the action was commenced.



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cedure Act, 1854, and who also deposed that he verily believed the interrogatories were necessary for framing the declaration. The affidavit of the defendant's attorney, in answer, stated that the patent was dated the 17th of June, 1841.

The summons was heard before *Bramwell*, B., who made an order for the delivery of the interrogatories.

*Mellish*, in the present Term, obtained a rule nisi to rescind the order of *Bramwell*, B.; against which

*Grove* (with whom was *Hance*) now shewed cause.—The 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), provides that, "by order of the Court or a Judge, the plaintiff may, with the declaration, and the defendant may, with the plea; or either of them by leave of the Court or a Judge may, *at any other time*, deliver to the opposite party, &c., interrogatories in writing." The rule laid down in *Croomes v. Morrison* (a) is, that a plaintiff, who seeks to deliver interrogatories before declaration, must do more than produce an affidavit in the terms prescribed by the 52nd section of the Common Law Procedure Act, 1854. Lord *Campbell*, C. J., there said: "He must always shew the nature of his case; but, if the application be before declaring, he must do more, in order to satisfy the Court that the interrogatories are pertinent, than is required if he has declared." That has been done in this case. The 41st section of "The Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), enacts that the plaintiff shall deliver, with his declaration, particulars of the breaches complained of in the action, and no evidence shall be given of any alleged infringement not contained in the particulars. Here the affidavit shews that the plaintiff

(a) 5 E. & B. 984.



cannot deliver proper particulars without interrogatories are administered to the defendant. In *James v. Barns* (a), the Court allowed a plaintiff to deliver interrogatories to the defendant after plea pleaded without a special affidavit. [*Martin*, B.—What is the principle on which a Court of equity would act in a case like this?] It is submitted that they would grant the application. In *The Patent Type Founding Company v. Lloyd* (b), which was an action for the infringement of a patent, a Court of equity granted an order for inspection, after the same application had been refused by this Court.

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*Mellish* (*Aston* with him), in support of the rule.—This is not a case in which the Court, in the exercise of its discretion, will allow interrogatories to be administered. The patent expired more than five years ago, and the plaintiff has not shewn any infringement of it within six years. He ought either to give some answer to the Statute of Limitations, or confine his interrogatories to an infringement within six years. In equity the plaintiff must have filed his bill, and shewn the ground on which he wanted a discovery, before he could ask to administer interrogatories. The practice at law and in equity cannot be assimilated; because in equity a defendant has three modes of dealing with a bill of discovery, either by demurrer, plea or answer. If the defence be so framed to raise an issue in law only, as by demurrer, the plaintiff will not be entitled to any discovery: *Wigram on Discovery*, sect. 48, p. 25, 2nd. ed. So, where the defence is by plea, the plaintiff will not be entitled to any discovery which may not be necessary for the trial of the plea itself: *id.* sect. 48, p. 26. And a defendant may plead in bar to the discovery that which is

(a) 17 C. B. 596.

(b) 5 H. &amp; N. 192.



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merely matter of legal defence to the action : *id.* sect. 66, 68. By analogy to the rules in equity, the plaintiff ought to shew, by affidavit, that he has an answer to the Statute of Limitations. Why should the defendant be compelled to disclose every machine he made, and every person to whom he sold it, when *primâ facie* there is a complete answer to the action? [*Channell, B.*—The 61st section enables either party, by leave of the Court or a Judge, to interrogate the other “upon any matter as to which *discovery* may be sought.” Therefore, to ascertain whether a party is entitled to an order for interrogatories, it must be seen whether the case is of such a nature that he would be entitled to a discovery under the 50th section.] Here, as there is no cause of action within six years, a Court of equity would not grant a discovery (*a*).

*Cur. adv. vult.*

POLLOCK, C. B., now said.—In the case of *Jones v. Pratt* (without laying down any general rule) we think that at present the plaintiff ought not to be allowed to administer interrogatories to the defendant, though possibly he may be entitled to do so after issue joined. In that case he will be at liberty to amend his particulars of breaches, in accordance with the answers given.

Rule absolute.

(*a*) See *Smith v. Fox*, 6 Hare, 386.





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EDWARDS and Another, Assignees of MAURICE, a Bankrupt, May 2.  
v. GABRIEL, PHILLIPS and ROBY.

**T**ROVER.—The first count of the declaration alleged a conversion of the goods of one Maurice, a bankrupt, before his bankruptcy. The second count alleged a conversion of the goods of the plaintiffs, as assignees of Maurice, since the bankruptcy.

Pleas: not guilty and not possessed.

At the trial, before *Pollock*, C. B., at the London Sittings after last Hilary Term, the following facts appeared:—The plaintiffs were the official and creditors' assignees of Maurice, the bankrupt. On the 29th of May, 1860, Maurice, who then carried on business as a merchant in London, sent the goods in question to the warehouse of one Southgate, a packer, at London Wall, to be packed and forwarded to Odessa. On the 26th of June, 1860, the defendant, Roby, recovered a judgment against Maurice, in the Court of Common Pleas, for 93*l.* 18*s.*; and on the 3rd of July issued a writ of *fi. fa.*, indorsed to levy 93*l.* 18*s.* and 1*l.* 6*s.* costs of execution, which writ was on the same day delivered to the defendants Gabriel and Phillips, who were sheriffs of London, to be executed. On the 6th of July, Roby called at Southgate's premises with an officer of the sheriffs and pointed out to him the goods in question as the goods of Maurice, and the officer then seized them and left a man in possession. On the 9th of July, Maurice petitioned the Court of Bankruptcy, under the 211th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), for a private arrangement with his creditors. This petition was duly filed, and a private sitting and an official assignee

Notice to an execution creditor that his debtor has filed a petition for arrangement under the 76th section of the Bankrupt Law Consolidation Act, 1849, is notice of an act of bankruptcy within the meaning of the 133rd section, provided an adjudication of bankruptcy is filed within two months after the petition for arrangement is dismissed.







Judge directed a verdict for the plaintiffs, reserving leave to the defendants to move to enter the verdict for them.

*Shee*, Serjt., in the present Term, obtained a rule nisi accordingly ; against which

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*H. James* (*Honyman* with him) shewed cause.—At the time of the sale of the goods under the execution, the defendants had notice of a prior act of bankruptcy committed by Maurice, and therefore the transaction is not protected by the 133rd section of the Bankrupt Law Consolidation Act, 1849. The 76th section enacts, “That the filing of a petition by any such trader for an arrangement between such trader and his creditors, under the provisions of this Act with respect to arrangements between debtor and creditor under the superintendence and control of the Court, shall be accounted and adjudged conclusive evidence of an act of bankruptcy committed by such trader at the time of filing such petition, provided a petition for adjudication of bankruptcy shall be filed against him within two months after such petition for arrangement shall have been dismissed: Provided also, that no adjudication shall be made on any such act of bankruptcy, unless and until after such petition for arrangement shall have been dismissed.” Here, everything has occurred which is required by that enactment to render the filing of the petition conclusive evidence of an act of bankruptcy—a petition for adjudication of bankruptcy was filed within two months, and the petition for arrangement was dismissed before any adjudication on the act of bankruptcy. It is contended, however, that the notice served on the defendants was not “notice of any prior act of bankruptcy” within the meaning of the 133rd section, because, at the time it was given, it was uncertain whether any petition for adjudication of bankruptcy would ever be filed, or the petition for arrangement be dismissed. But the deci-



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sions on a corresponding enactment, in the 5 & 6 Vict. c. 122, shew that when those events occurred, they had relation back to the time of filing the petition for arrangement, and rendered it conclusive evidence of an act of bankruptcy at that time. The 22nd section of the 5 & 6 Vict. c. 122 enacted, that if any trader shall file a declaration of insolvency in the mode there prescribed, he "shall be deemed thereby to have committed an act of bankruptcy at the time of filing such declaration, provided a fiat in bankruptcy shall issue against such trader within two months from the filing such declaration." In *Follett v. Hoppe* (a) a trader, against whom a judgment had been obtained, filed a declaration under that Act and gave his creditor notice of it, and on being taken in execution paid the judgment debt; a fiat in bankruptcy having issued against him within two months from the filing the declaration, it was held that his assignees were entitled to recover the money so paid. *Green v. Laurie* (b) is another authority to the same effect. In *Monk v. Sharp* (c), where it was held that filing a petition for arrangement was not an act of bankruptcy, the petition had never been dismissed, and no petition for adjudication of bankruptcy had been filed within two months.

*Shee*, Serjt., and *Barnard*, in support of the rule.—It is not contended that a petition for arrangement under the 211th section is not an act of bankruptcy from the time it is filed, provided the events occur which are required by the 76th section; but the question here is, whether before the sale the defendants had notice of a prior act of bankruptcy, or whether they are not protected by the 133rd section. As there was no adjudication of bankruptcy before the execution was completed by sale of the goods, there was up to that time no act of bankruptcy, and consequently

(a) 5 C. B. 226.

(b) 1 Exch. 335.

(c) 2 H. &amp; N. 540.



no notice of one within the meaning of the 133rd section. The question does not depend on the 76th section alone, but also on the 89th, 101st and 133rd. The 89th points out the proceedings to be taken to obtain adjudication of bankruptcy. They originate by petition upon which there must be an adjudication of bankruptcy: sect. 101. Here, there could be no adjudication until the petition for arrangement was dismissed, which was not until after the sale of the goods. [Pollock, C. B.—The 76th section says, that the filing a petition shall be evidence of an act of bankruptcy *at that time*. The defendants had notice that a petition was filed which might or might not be an act of bankruptcy, and after that, if they choose to deal with the goods, it was at their peril.] The statute does not say that notice of filing a petition shall be notice of an act of bankruptcy; and unless the creditor has notice of some act, upon which proceedings of adjudication can at once take place, he has no notice of an act of bankruptcy within the 133rd section. In *Follett v. Hoppe* (a) and *Green v. Laurie* (b), the petitions were filed under the Insolvent Act. *Conway v. Nall* (c) shews that, in order to defeat an execution, the creditor must have notice of a prior act of bankruptcy complete in itself at the time the notice is given. The notice there given was to the following effect:—"J. S. has committed an act of bankruptcy. He signed a declaration of insolvency yesterday. J. S. will be declared bankrupt immediately. I have sent for a fiat;" and that was held not such a notice as to deprive the execution creditor of the protection of the 2 & 3 Vict. c. 29, the 6th section of the 6 Geo. 4, c. 16, requiring the declaration of insolvency to be filed and advertized in the *London Gazette*. [Pollock, C. B.—That was no notice of an act of bankruptcy *committed*, but only

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(a) 5 C. B. 226.

(b) 1 Exch. 335.

(c) 1 C. B. 643.



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that it *would* be committed. The notice amounts to this "I give you notice there is going to be an act of bankruptcy and I have sent for a fiat." Lying in prison for debt for months was made an act of bankruptcy by the 1 Jac. c. 15. That period was reduced to two months by the 21 Jac. 1, c. 19. The 6 Geo. 4, c. 16, made a further reduction to twenty-one days; but when the requisite time was completed, it had relation back to the day of the first arrest. In Henley's Bankrupt Law, p. 263, it is said: "Where a payment is made to a trader who is in prison, the party have notice of that fact, and if the requisite time to constitute an act of bankruptcy be afterwards complete such payment will not be protected." The authority cited for that position is *King v. Leith* (a), which decided if a trader become bankrupt by lying in prison two months after his arrest, his assignees may maintain an action for money had and received against a person who, having notice that a commission would be issued against him, sells his goods and pays him the produce before the two months have expired. *Ashurst, J.*, there said:—"Though, strictly speaking, at the time of the notice the act of bankruptcy was not complete yet after that notice the defendant was not warranted in paying the money over to the bankrupt, and it cannot be called a bona fide payment." Here the execution was bona fide levied. *Hocking v. Acraman* (b) decided that notice of a docket having been struck is not "notice of a prior act of bankruptcy" within the meaning of the 2 & 3 Vict. c. 26 [Pollock, C. B.—That was only a notice that some one has sworn that he believed the trader had committed an act of bankruptcy.] Here the proceedings were inchoate only at the time of the sale.

POLLOCK, C. B.—The rule must be discharged. Th

(a) 2 T. R. 141. 144.

(b) 12 M. & W. 170.



question turns on the construction of the 76th section of the Bankrupt Consolidation Act, 1849, which makes the filing a petition for arrangement conclusive evidence of an act of bankruptcy at the time of filing it, provided a petition for adjudication of bankruptcy shall be filed within two months after the petition for arrangement is dismissed. That having occurred, the bankruptcy has relation back to the time of filing the petition, so that the defendants who had notice of the filing had notice of an act of bankruptcy. Mr. *Barnard* is right in saying that no case has occurred in Westminster Hall upon this particular statute, but there are old authorities on corresponding provisions in the 21 Jac. 1, c. 19, and 6 Geo. 4, c. 16. The 21 Jac. 1, c. 19, s. 6, rendered the lying in prison for debt for two months an act of bankruptcy, and the case of *King v. Leith (a)*, to which I have already referred, decided that when the two months expired the bankruptcy related back to the day of arrest, and that a person who, with notice that the bankrupt was in prison, sold his goods and paid him the money during the period of the two months was liable to his assignees. There *Buller, J.*, said:—"Whether this be considered on the construction of the bankrupt laws, or on the cases adjudged, I have not the smallest doubt but that the bankruptcy relates to the day on which the bankrupt was arrested; and the Court are bound to consider it so, and reason upon it as such." Here the statute says that the filing a petition for arrangement shall be conclusive evidence of an act of bankruptcy committed by the trader *at the time of filing such petition*; and, in putting a construction upon that statute, I consider that we are bound by the old authorities, and that the plaintiffs are entitled to recover.

MARTIN, B.—I did not hear the whole of the argument, and therefore decline giving any opinion.

(a) 2 T. R. 141. 144.

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BRAMWELL, B.—I am also of opinion that the rule ought to be discharged. No doubt there is a difference between the enactment referred to in the statute of James and that in the present Act, because the former does not say at what time the act of bankruptcy shall be complete, but the latter says that the filing the petition shall be an act of bankruptcy *from the time of filing it*. Now, suppose it had gone on to say that there should be no adjudication of bankruptcy until the expiration of two months after the filing the petition, surely an execution creditor, who had notice of the filing of the petition, would be bound to observe that nothing could be done with the goods until the expiration of the two months. *Green v. Laurie (a)*, which was decided on a corresponding section in the Insolvent Act, 5 & 6 Vict. c. 122, is very much in point. The 76th section of the present Act is inartificially drawn. It says the filing a petition shall be accounted and adjudged conclusive evidence of an act of bankruptcy, provided a petition for adjudication of bankruptcy shall be filed within two months after the petition for arrangement is dismissed; and provided also that no adjudication shall be made until after the petition for arrangement shall have been dismissed. In this case those conditions have been complied with, and consequently we have what the statute says shall be conclusive evidence of an act of bankruptcy. I therefore think that the notice served on the defendants was a valid notice of that act of bankruptcy.

WILDE, B.—I am of the same opinion. The 76th section of the Bankrupt Act says that the filing a petition for arrangement shall, under certain circumstances, be an act of bankruptcy from the time of filing it. Here those circumstances have happened; therefore there was an act of bankruptcy from the time of filing the petition, and the only

(a) 1 Exch. 335.



question is whether the defendants had notice of that act of bankruptcy. It is said that, though they had notice of an act of bankruptcy, they had not notice within the meaning of the 133rd section, because at the time the notice was given they did not know whether the filing the petition would turn out to be an act of bankruptcy. But to put such a construction on the 76th section would do violence to its language, for it expressly says that if a petition for arrangement is filed and certain events occur, the filing the petition shall be an act of bankruptcy *from the time of filing the petition*. On the plain words of the statute, I think that this rule ought to be discharged.

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Rule discharged.

SYMONDS v. PAIN and Others.

May 2.

THE declaration stated, that in consideration that the plaintiff, at the request of the defendants, would retain and employ the defendants to tow a certain fishing-smack of the plaintiff from Yarmouth harbour out to sea, for reward to the defendants in that behalf, the defendants promised the plaintiff to tow the said smack in a careful, skilful and proper manner: that the plaintiff, confiding in the said promise, employed the defendants to tow the said smack upon the terms aforesaid, for such reward as aforesaid; and although the defendants accepted and entered upon the said retainer and employment, and under the same did tow the said smack, and the plaintiff had done all things, and all times had elapsed, necessary to entitle the plaintiff to have the defendants so to tow the said smack in a careful, skilful and proper manner, yet the defendants omitted so to do, and by their carelessness, negligence and unskilfulness in

The master of a steam-tug, of which the defendants were owners, was employed by the plaintiff to tow his smack out of a harbour. In so doing the smack was stranded through the alleged negligence of the master. The plaintiff had on previous occasions hired the defendants' steam-tug, and on paying the charge had received a receipt, upon the back of which was printed a notice that the defendants would not be answerable for damage occasioned by any supposed negligence of their servants. —Held, that it was a question for the jury whether the contract was made on the terms printed on the back of the receipts.



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that behalf the said smack became and was improperly detached from the said tug by which the defendants were so towing the same, and was run in and driven upon a sand bank, and became stranded and damaged, &c.

Pleas.—First: non-assumpsit. Secondly: that the plaintiff did not retain and employ the defendants, nor did the defendants accept and enter upon the said retainer and employment as alleged. Thirdly: a traverse of the breach.—Issues thereon.

At the trial, before *Pollock*, C. B., at the last Norfolk Spring Assizes, the following facts appeared:—The plaintiff was owner of a fishing-smack called the “Agenoria,” and the defendants were owners of a steam-tug called the “Florence Nightingale.” On the 21st of November last, the plaintiff requested the master of the steam-tug to tow his smack out of Great Yarmouth harbour to sea. The master took the smack in tow together with a schooner and a lugger, the smack being next to the tug, and proceeded with them out of the harbour. Before they were clear of the harbour, the master improperly, as the plaintiff alleged, cast off the tow-rope which was attached to his smack, and in consequence it was stranded. The plaintiff, on cross-examination, admitted that on previous occasions he had employed the defendants’ tugs to tow his smack out to sea, and that he had received from the defendants printed receipts for their charges in the following form:—

“Mr.—

“D<sup>r</sup>. to owners of Volunteer and Florence  
 Nightingale Steamers, Chesapeake and  
 Andrew Woodhouse.

“To towing

“Received \_\_\_\_\_

“Office — at S. J. Hill’s, Shipchandler, South Quay.

“N.B.—The owners will feel particularly obliged by payment on delivery of this bill.



"The owners of the above steam-tugs are not responsible for any damage done by the vessels towed either to themselves or others."

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On the back of these receipts were printed the rates charged for towing and the following notice:—

"To shipowners, fishing-owners, shipmasters and others.

"The owners of the Volunteer and Florence Nightingale steam-tugs respectfully give further notice, that on and after the 1st day of April, 1859, they will tow vessels, boats or other craft, by the above named steam-tugs, on the following conditions only, as heretofore.—That they are not to be answerable or accountable for any loss or damage whatever, which may happen to or be occasioned by any vessel, boat or craft, or any of the cargoes on board the same, whilst such vessel, boat or craft are in tow of either of the above steam-tugs, in the river or at sea, and whether arising from or occasioned by any supposed negligence or default of them or their servants, or defects or imperfections in the said steam-tugs, or either of them, or the machinery, or any other part of the same, or any delays, stoppage or slackness of the speed of the same, however occasioned or for what purpose, wheresoever taking place; and that the owner or persons interested in the vessels, boats or crafts, or the cargoes on board the same, so towing, undertake to bear, satisfy and indemnify the said tug-owners against the same. All vessels waiting to be towed to be booked, and towing money paid at the tug-office.

"Samuel John Hill, Shipchandler, South Quay, Great Yarmouth, April, 18, 1859."

The plaintiff said that he had no recollection of having read the notice, or even of having looked at the back of the receipts, and that the notice had never been brought to his knowledge in any other way. The defendants charge for towing the plaintiff's smack was 7s. 6d.



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At the conclusion of the plaintiff's case, the Lord Chief Baron expressed an opinion that the evidence did not prove the contract alleged in the declaration: that the contract was upon the terms of the notice, and that the plaintiff, having the means of knowledge, in point of law had knowledge of the notice: that he knew he was dealing with a servant of the defendants, and who therefore had only a limited authority and could not contract except on the terms of the notice; and that it was evident the defendants did not undertake, for the charge of 7s. 6d., to be insurers against accidents to the vessels they towed. The plaintiff was then nonsuited.

*Bulwer*, in the present term (April 16), obtained a rule nisi for a new trial on the ground of misdirection, namely, that evidence in support of the issues was given in the plaintiff's favour, which ought to have been left to the jury: that the jury ought to have been asked what the contract between the parties was, and whether the plaintiff was bound by the terms of the notice on the back of the receipts: that the jury ought to have been told that, even assuming the plaintiff to have contracted on the terms of the notice, nevertheless a breach of the contract was proved.

*O'Malley* and *Keane* shewed cause.—The question is, whether the learned Judge was right in withdrawing from the jury the question whether the contract was made on the terms mentioned on the back of the receipt. This is not the case of a common carrier. There was no common law obligation on the defendants to tow the plaintiff's vessel, but the liability depends on contract. Then, what were the terms of the contract proved, and was there any evidence that the defendants authorized such a contract? The contract declared on is a contract *simpliciter* to use due care and skill in towing the plaintiff's vessel. Such a contract



would be implied by law from the previous dealing between the parties; but the contract which the defendants entered into was upon the terms printed on the back of the receipts. It cannot be supposed that they meant to be insurers against accident, when they only charged 7s. 6d. for the towing. The plaintiff had several of these receipts; and he cannot cast a responsibility on defendants by not reading them. He had the means of knowledge, which, in law, is knowledge. If a letter is sent containing a notice, though the person to whom it is sent may not choose to read it, it is nevertheless a notice. [*Martin, B.*—It was a question for the jury whether the contract was on the terms to be collected from these documents.] The Judge would be bound to tell the jury, as a matter of law, that the contract was on those terms. The master of the steam-tug was an agent with limited authority, and could only contract on the terms of the notice. [*Pollock, C. B.*—The notice might have been made more public, or the defendants might have directed the masters of their vessels to call the attention of persons employing them to the terms of the notice.] The plaintiff having several of these receipts containing the notice, the case is the same as if notice had been given him by word of mouth. The question whether there was any evidence of the contract alleged in the declaration was a question for the Judge, and he has rightly decided that there was none.

*Bulwer* and *J. Cherry* appeared to support the rule, but were not called upon to argue.

*MARTIN, B.*—I am of opinion that the rule should be absolute. The declaration is in the common form against the owners of a steam-tug for negligence in towing the plaintiff's vessel out to sea. On the cross-examination of

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EXHIBIT 100

THE FIRST PART OF THE REPORT IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE SECOND PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE THIRD PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE FOURTH PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE FIFTH PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE SIXTH PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE SEVENTH PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE EIGHTH PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE NINTH PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR. THE TENTH PART IS A SUMMARY OF THE WORK DONE DURING THE YEAR.

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paper—the plaintiff would have been bound by those terms. Here, however, the document given to the plaintiff was not the contract, but a receipt, and it may be that he never looked at the terms, for no man is under any obligation to read a printed notice on the back of a receipt. I therefore think that the circumstance of having those receipts is not equivalent to knowledge. Suppose a tradesman sends a customer a circular, which the latter throws into the fire—without reading it, but afterwards goes to the tradesman's shop and purchases some goods, could the tradesman say, "You have had my circular, and know my terms of dealing, and the purchase was made on those terms"? He certainly could not, as there was no obligation to read the circular. If the defendants only did their work, as they contend, on the terms printed on the back of those receipts, it was a matter of fact for the jury whether the plaintiff could have received them without those terms being brought to his knowledge.

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WILDE, B.—I concur, with reluctance, in making the rule absolute. I say with reluctance, because substantial justice was done at the trial in nonsuiting the plaintiff; for it is impossible to believe that he did not know that the defendants meant to protect themselves by the notice when they did the work for such a trifling charge. I agree with my brother *Bramwell* that most probably the jury would have found that the contract was made on the terms contained in the notice; but, as a matter of strict law, I think there was evidence of a contract without condition, and also evidence of a qualification of that contract, and the question what was the real contract ought to have been submitted to the jury.

POLLOCK, C. B.—I doubt whether the evidence fully  
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the plaintiff some receipts were put into his hands, upon the back of which was printed a notice of the terms upon which the defendants did business, and it was contended that the contract was made upon those terms, and that the defendants were entitled to a verdict, or the plaintiff ought to be nonsuited, on the ground of variance. I am of opinion that it was a question for the jury what was the contract which the plaintiff and defendants entered into, and that it was not a question of law for the Judge to decide. Whether the plaintiff had knowledge of the notice by reason of having the receipts was essentially a question of fact, and ought not to have been withdrawn from the consideration of the jury.

BRAMWELL, B.—I am also of opinion that there ought to be a new trial; but I am still inclined to think that if the jury had done their duty they must have found in accordance with my lord's direction. *Mr. O'Malley* admits that the contract alleged in the declaration is one which would be implied by law from the relation between the parties, and that the master of the tug would have authority to enter into the usual contract for towing vessels; but of course it is competent to the defendants to shew that no such contract was entered into. For that purpose they put into the hands of the plaintiff certain papers, partly printed and partly written, and which, it was said, contained the terms of the contract; and the plaintiff having admitted that he had many of those documents in his possession, it was contended that he must be taken to have a knowledge of their contents. If, indeed, upon the employment of the steam-tug, a paper containing the terms upon which the defendants towed vessels had been put into the hands of the plaintiff—no matter whether the whole or a part only was printed, or whether on the front or back of the



paper—the plaintiff would have been bound by those terms. Here, however, the document given to the plaintiff was not the contract, but a receipt, and it may be that he never looked at the terms, for no man is under any obligation to read a printed notice on the back of a receipt. I therefore think that the circumstance of having those receipts is not equivalent to knowledge. Suppose a tradesman sends a customer a circular, which the latter throws into the fire—without reading it, but afterwards goes to the tradesman's shop and purchases some goods, could the tradesman say, "You have had my circular, and know my terms of dealing, and the purchase was made on those terms"? He certainly could not, as there was no obligation to read the circular. If the defendants only did their work, as they contend, on the terms printed on the back of those receipts, it was a matter of fact for the jury whether the plaintiff could have received them without those terms being brought to his knowledge.

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 VOL. VI.—N. S.                      E E E                      EXCH.



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justified the view I took at the trial; but had it gone further, and shewn that these notices were stuck up on the wharves or otherwise made public, I should have thought the matter clear. If the notice had been on the face of a document by which the defendants undertook to perform the service, there could have been no doubt; but it was on the back of receipts which the plaintiff was under no obligation to read. The declaration alleges the ordinary contract which the law would imply from the employment, and the question is whether such a contract was proved. If the case had turned solely on that, I should not have been disposed to grant a new trial any more than I should in an undefended case, because the jury were not asked whether they found for the plaintiff or the defendant. But, in reality, the contest at the trial was, not that these notices were not given by the defendants, but that, notwithstanding the notices, and notwithstanding proof that the plaintiff was cognizant of them, the defendants were liable. However, upon the question of evidence, to which my attention was not so particularly called at the trial as it has now been, I think the rule ought to be absolute, though, if notice is brought home to the plaintiff, I do not see how it can be successfully contended that the defendants are not exonerated.

Rule absolute (a).

(a) The cause was again tried before *Erle*, C. J., at the Norwich Summer Assizes, 1861, when the defendants proved that, before the cause of action arose, they had caused bills to be posted about the quays and public houses at Yarmouth frequented by fishermen, containing a notice similar to

that printed on the back of the receipts. The learned Judge left it to the jury to say whether the contract between the plaintiff and defendants was made on those terms, and, the jury having found in the affirmative, the plaintiff elected to be nonsuited.



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In the Matter of FERNANDES, a Prisoner, &amp;c.

April 23.

**I**N November, 1859, Joze Luis Fernandes was examined as a witness before the Commissioners appointed under a commission of her Majesty to inquire into certain corrupt practices at the election for the borough of Wakefield in April, 1859.

A Court of assize is a superior Court; and consequently, in a warrant of commitment by a Judge of assize for contempt, the adjudication of contempt may be general, and the particular circumstances need not be set out.

On the 25th day of January, 1860, the Commissioners granted him their certificate in these words:—"Certificate to witness. Wakefield Election Inquiry Commission: Whereas a commission, dated the 20th of August, A.D. 1859, was issued under the 15 & 16 Vict. c. 57, directed to us G. Pigott, W. H. Willes and W. Slade, appointing us Commissioners to make inquiry under the said Act, into the existence of corrupt practices at elections for members to serve in parliament for the borough of Wakefield: And whereas, in pursuance of the said commission, we have proceeded with the said inquiry under the said Act, and in the progress of such inquiry and of the proceedings connected therewith J. L. Fernandes has been examined by us as a witness, and has given evidence before us touching such corrupt practices as aforesaid: Now we, the said G. Pigott, W. H. Willes and W. Slade hereby certify under our hands that the said J. L. Fernandes has, upon his examination, made a true disclosure touching all things to which he has been examined within the meaning and intent of the 9th and 10th sections of the said Act. Given under our hands the 28th day of January, A.D. 1860. G. Pigott, W. H. Willes, W. Slade."

A criminal information for bribery at the said election, which was subsequently filed against one John Barff Charles-



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worth, came on for trial, before *Hill, J.*, at the Yorkshire Spring Assizes in 1861. On that occasion *J. L. Fernandes* was present in obedience to a subpoena to attend and give evidence on behalf of her Majesty on the information, and was examined as a witness. In the course of his examination the following question was put to him by the Solicitor General, who conducted the prosecution:—

“Did you receive any money from the defendant *John Barff Charlesworth* in the month of April 1859?”

The witness declined to answer the question, stating that he had been advised by counsel that he was not bound to do so.

The Solicitor General asked the witness if he had been examined before the Commissioners, and whether he had received a certificate. The certificate and the commission under the sign manual of her Majesty were then put in.

The learned Judge, after consulting *Keating, J.*, stated that having considered the question whether the witness would be exposed to any peril by reason of answering the question proposed to him, they were both of opinion that he would be free from all penal actions, forfeitures, punishments, disabilities, incapacity, criminal proceedings of every kind and sort by reason of the certificate which had been granted to him, upon any matter connected with corrupt proceedings at the Wakefield election, and that he was bound to answer the question.

The witness stated that he had been advised that the certificate was no sufficient indemnity against an impeachment by the House of Commons.

The learned Judge stated that in his opinion it was. The witness however persisted in his refusal to answer, notwithstanding repeated remonstrances and warnings by the Court. The learned Judge then said that no other course was left him than to state that, the evidence of the witness being material to the prosecution which was before the



Court, he well knowing that fact, had sought to evade giving the benefit of his testimony to the administration of justice, in a way which shewed that he was firmly persuaded that he would be in no peril if he did answer the question. His lordship therefore adjudged the witness guilty of contempt, and sentenced him for that contempt to be imprisoned for the period of six calendar months unless sooner discharged by competent authority, and to pay a fine of 500*l.*, and be further imprisoned until that fine was paid.

The Associate then ordered the gaoler to take the witness into custody.

The following is a copy of the warrant of commitment:—

“Yorkshire, } At the Assizes, held at the Castle of York,  
to wit. } in and for the said county, on Thursday, the  
7th day of March, in the 24th year of the reign, &c., and in  
the year of our Lord 1861, before the Honorable Sir *Hugh Hill*, Knight, and the Honorable Sir *Henry Singer Keating*,  
Knight, two of her Majesty’s Justices assigned to take the  
said assizes according to the statute,” &c.

“The Queen } On the trial of the information against  
v. } the defendant, for bribery alleged to have  
John Barff } been committed by him on the election of  
Charlesworth. } a burgess to serve in parliament for the  
borough of Wakefield, J. L. Fernandes, a witness produced,  
sworn, and examined on behalf of the Crown, having re-  
fused to answer a certain question touching the matter in  
issue in the said information, put to him by her Majesty’s  
Solicitor General, of counsel for the Crown in that behalf, and  
this Court having adjudged that the said J. L. Fernandes  
was bound by law to answer the said question, and having  
required him so to do, he wilfully, and in contempt of the  
Court, refused to answer the said question, and he having  
wilfully persisted and still so persisting in such his refusal, the  
said Court doth therefore adjudge that the said J. L. Fer-  
nandes has been and is guilty of a contempt of Court; and the

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said Court doth order and adjudge that the said J. L. Fernandes be for such his contempt committed, and he is hereby committed, to the custody of the sheriff of the said county of York, and to his keeper of her Majesty's gaol of the Castle of York in and for the said county, to be there detained and kept in safe custody for the term of six calendar months from the day and year first above mentioned. And the said Court doth further order and adjudge that the said J. L. Fernandes, also for such his contempt, shall and do pay to our said lady the Queen the sum of 500*l.*, and that he be further detained in the custody aforesaid until the said sum of 500*l.* shall have been paid.

By the Court.

Bell, Associate."

On affidavits stating the above facts, setting out the opinion of counsel referred to, and alleging that the witness really and conscientiously believed that answering the question would have a tendency to accuse himself; that he had no intention of doing more than to stand on what he believed were his legal rights, and that he was not called upon to shew cause why sentence should not be passed upon him,

*Bovill* moved for a writ of habeas corpus to bring up the body of J. L. Fernandes in order that he might be discharged from custody (a).—First: the prisoner is liable to be impeached by the House of Commons, notwithstanding the certificate, whether the offence of bribery is a high crime and misdemeanor at common law or only by statute. [*Pollock*, C. B., referred to 4 Black. Comm. p. 259, and *Rex v. Flower* (b). *Bramwell*, B.—We ought to hear the warrant of commitment read and see if it is objectionable.] The warrant is defective. [*Wilde*, B., referred to *Gosset v. Howard* (c).] The warrant is simply headed, "At the

(a) April 19. Before *Pollock*,  
 C. B., *Martin*, B., *Bramwell*, B.,  
 and *Wilde*, B.

(b) 8 T. B. 314.

(c) 10 Q. B. 359. 411.



Assizes held at the Castle of York, in and for the said county, &c., before Sir *H. Hill* and Sir *H. S. Keating*, two of her Majesty's justices assigned to take the said assizes according to the statute." The Judges have several commissions, viz., oyer and terminer, general gaol delivery, of assize and nisi prius by the statute of West. 2, 13 Edw. 1, c. 30, and of the peace. Not only the Judges but the serjeants and Queen's counsel are joined in these commissions. Any Commissioner may fine and imprison if the Judge at nisi prius has such power. A Court so constituted cannot issue warrants in a general form; it is a Court of limited jurisdiction deriving its authority from the commission, and its commitments should therefore shew on the face of them that the Court had jurisdiction. In *Harrison v. Wright (a)*, that rule was applied to the case of a Judge making an order under the Interpleader Act, 1 & 2 Wm. 4, c. 58. Even the steward of a Court leet may fine and imprison. In commitments by the superior Courts at Westminster or by the High Court of Parliament, it is not necessary to state the cause of the commitment; but in commitments by inferior Courts it is always necessary to state the cause of the commitment, in order that the Courts at Westminster may be able to judge of the sufficiency of the cause. That the authority of a Judge of assize depends on the commission under which he is acting appears from *Bullock v. Parsons (b)*: per *Holt*, C. J. In Bacon's Abridg. Courts (D.), it is said:—"The most general division of our Courts is into such as are of record or not; those of record are again divided into such as are supreme, superior and inferior. \* \* \* Superior Courts of record are again those that are more principal or less principal; the more principal ones are the Lords House in Parliament, the Chancery, King's Bench,

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(a) 13 M. & W. 816.

(b) 2 Salk. 454. He also referred to 4 Inst. 162. 168.



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Common Pleas and Exchequer; and by *Hale*, such are the justices itinerant *ad communia placita et ad placita forestæ*. The less principal ones are such as are held by commission of gaol delivery, *oyer and terminer*, assize, *nisi prius*, &c., by custom or charter, as the Courts of the counties palatine of *Lancaster, Chester, Durham*, or by virtue of acts of parliament and the King's commission, as the Court of sewers, justices of the peace, &c." Commissioners of sewers have power to hold Courts and assess fines. In *Bushell's Case* (a) it was held that a general form of commitment by a Court of oyer and terminer was insufficient: that "the commitment and return pursuing it being in itself too general and uncertain, the Court ought not implicitly to think that the commitment was *re verâ* for cause particular and sufficient enough, because it was the act of the Court of sessions" in London. In the present case the commitment is not signed by a judge or serjeant. In *Bushell's Case* it was suggested that the commitment might have been made by an alderman. So, here, it might have been a commitment by a counsel whose name was in the commission. The commitment should have set out the facts so as to shew that the Court arrived at a proper conclusion. In Vaughan's Reports, p. 154, four instances are given where, upon habeas corpus, the Court of Common Pleas discharged prisoners committed by other Courts upon the insufficiency of the return only. In *The Earl of Shaftesbury's Case* (b) the Earl having been committed by the House of Lords for a high contempt against the House, though the warrant did not express the nature of the contempt, nor the place where it was committed, nor the time when it was committed, nor whether it was on a conviction

(a) Vaughan, 135. 138. 140. *ling*, 3 Keb. 322.  
 He also referred to *Bushell's Case*, (b) 1 Mod. 144. 157.  
 1 Mod. 119, and *Bushel v. Star-*



or accusation only, the Court of King's Bench refused to discharge him by habeas corpus. But Sir *T. Jones*, J., said, "Such a return made by an ordinary Court of justice would have been ill and uncertain." If the Court had no power to make a general warrant, the rule as stated by Lord *Denman* in *Howard v. Gosset* (a), applies, viz., that "at common law every warrant must speak for itself, and must shew two things, a good cause for depriving the party named of his liberty, and some lawful period for his confinement." It is true, that in the case of a warrant of commitment by the Speaker of the House of Commons for contempt, it is not necessary to shew the nature of the contempt; but that is because "credit is given (which in the case of an inferior jurisdiction would not be) to the House of Commons that they would not commit without a sufficient cause": per *Williams*, J. (b), *Brass Crosby's Case* (c). [*Wilde*, B.—I am not aware that in any of the cases which arose out of *Stockdale v. Hansard* (d) it was said that in this respect Parliament is of higher jurisdiction than the superior Courts at Westminster.] In *Regina v. Paty and Others* (e) *Gould*, J., held that "the return being of a commitment by the House of Commons, which is superior to this Court (Queen's Bench), it is not reversable for form." The power to compel the witness to answer the question being a special statutory power, the nature of the power should have been stated, according to the principle acted upon in *Harrison v. Wright* (f), *Christie v. Unwin* (g), and *Brancher v. Molyneux* (h). The prisoner having been committed for a refusal to answer a particular question, the question should have

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(a) 10 Q. B. 359; see p. 407,  
and per *Coleridge*, J., p. 381.

(b) 10 Q. B. 401, 402.

(c) 2 W. Black. 754. 757.

(d) 9 A. & E. 1.

(e) 2 Ld. Raym. 1105.

(f) 13 M. & W. 816. 819.

(g) 11 A. & E. 373.

(h) 4 Man. & G. 226.



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been set out in order to enable the Court to judge whether it was a lawful question, according to the rule adverted to by Parke, J., in *Ex parte Leake* (a), and established in *Thomson's Case* (b). It cannot be collected from the expression "the Court having adjudged," and the signature "By the Court; Bell, Associate," by what Court the prisoner was adjudged guilty of contempt. [Pollock, C. B.—The hearing is the same as that of an order of reference. Martin, B.—It is the same as that of the calendar signed by the Judge which warrants the execution of a prisoner found guilty of murder. Pollock, C. B.—The legal authority to the sheriff to execute a prisoner is the sentence pronounced in open Court, which he is supposed personally to hear. Charles Ratcliffe, the brother of Lord Derwentwater, was executed on Tower Hill by an ordinary rule of Court (c).] It does not appear whether the trial took place on the civil or criminal side of the Court. [Bramwell, B.—In *Mansell v. The Queen* (d) the record set out the commission of the Judge. Wilde, B.—It appears to have been before justices assigned to take the assizes. In *Rex v. Jolliffe* (e) it was held that an affidavit made at nisi prior to put off the trial of an information, must be considered as taken under the authority of the Court of Queen's Bench.] It does not appear that this was an issue set down from either of the superior Courts at Westminster [Bramwell, B.—We must take it for granted that the proceedings took place before Commissioners assigned to take

(a) 9 B. & C. 234. 240.

(b) 12 Rep. 104.

(c) See "*Proceedings at the Court of King's Bench, Westminster, Nov. 21, against Charles Ratcliffe, Esq., on a conviction and attainder of high treason in*

*May 1716 before special Commissioners of oyer and terminer* 20 Geo. 2, A.D. 1746," 18 State Trials, 429. See also *Rex v. Rogers and Others*, 3 Burr. 180.

(d) 8 E. & B. 54.

(e) 4 T. R. 285. 292.



the assizes. It is not material that they had other Commissions.] Criminal trials take place under the commission of oyer and terminer and general gaol delivery; and it cannot be assumed that this trial did not take place under the commission of oyer and terminer. Even supposing that a warrant of commitment in general terms would have sufficed, yet if a cause is stated in part, the whole ought to be set out so as to shew its sufficiency. Here the commitment does not shew that the question put to the witness was material. Next, assuming that the Court had not the same authority as the Courts at Westminster, the merits may be inquired into on affidavits: in *Re Bailey (a)*. The witness was not bound to answer the question, because the production of the certificate would not protect him from impeachment by the House of Commons. It is for the witness, not for the Judge, to determine whether the answer may criminate him: *Fisher v. Ronalds (b)*, *Adams v. Lloyd (c)*, *Regina v. Garbett (d)*. The Court cannot compel a witness to answer, if the answer will criminate him, though he has been pardoned, or suffered punishment for the offence: *Reading's Case (e)*. [*Wilde, B.*—Suppose a witness were asked, "Is your name Jones?" and said "I refuse to answer, because it may criminate me."] Lastly, the witness should have been called upon to say why he should not be deemed guilty of contempt.

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*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—I have to deliver the judgment of the Court in this case, moved by Mr. *Bovill* on Friday last. The

(a) 3 E. & B. 607.

(b) 12 C. B. 762.

(c) 3 H. & N. 351.

(d) 2 C. & K. 495.

(e) 7 Howell's State Trials, 259. 296. See however Taylor on Evidence, s. 1312, p. 1135, 2nd edition, and cases there cited.



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motion was for a writ of habeas corpus to bring up the body of J. L. Fernandes in order to his being discharged on the ground that the commitment was illegal. The argument occupied a considerable time, and was founded on cases very often cited, and some of ancient date. We had little doubt at the close that the writ ought not to issue, but we thought it desirable to take a short time to look into the state of the law upon the subject; and we are of opinion that no writ ought to be granted. The only question in reality before us is, whether the Court of Assize at York (which orders this commitment,) is a superior or an inferior Court. If superior, it is not required to set out the cause of commitment with the particular circumstances; it is sufficient to state the cause generally; otherwise, if it be an inferior Court. To support the view of Mr. *Bovill*, that the Court of Assize is an inferior Court, two authorities, and on two, were cited. The first was Bacon's Abridgment, at "Courts," letter (D.), on referring to which it appears to be an authority directly the other way. Courts of record are there divided into *Supreme*, *Superior*, or *Inferior*. Superior Courts of record are more principal or less principal. The more principal are Parliament, Chancery, King's Bench, Common Pleas and Exchequer, with the justice itinerant. The less principal Courts are such as are held by commission of gaol delivery, oyer and terminer, assizes nisi prius, &c., and all these seem to stand upon the same footing. A Court of assize or of nisi prius is therefore a superior Court, though a less principal one, and, as such, has authority to commit for contempt, without setting forth the particulars of the contempt in respect of which the commitment is awarded.

The other authority was *Bushell's Case*,—the comment upon which by Lord *Ellenborough*, in *Burdett v. Abbott* (a)

(a) 14 East, 69, 70.



shew that for this purpose *Bushell's Case* is no authority. It was cited to shew that an order of the Court of Commissioners at the Old Bailey ought to set out the cause of commitment, and therefore that that Court is to be considered an inferior Court. In page 70 Lord *Ellenborough* called Mr. *Holroyd's* attention to the fact that in *Bushell's Case* it is laid down *generally* that the cause of commitment ought to appear (whether the Court be superior or inferior), and that the necessity of setting out the cause with particularity is not confined to the case of an *inferior* Court, but ought to be observed whether the Court be inferior or superior, and Mr. *Holroyd* admitted (as he could not avoid doing) that it was laid down *generally*. So far *Bushell's Case* was wrong, though the decision was quite right.

The argument therefore fails to shew that the Court of Commissioners at the Old Bailey was an inferior Court. But there is an authority (not cited by Mr. *Bovill*) which goes directly to shew that that Court is a superior Court in the opinion of Lord Chief Justice *Abbott*, and also expressly of Mr. Baron *Wood*; it is *Rex v. Clement (a)*. In that case the Court at the Old Bailey had made an order forbidding any publication of a portion of certain trials till the whole were concluded; this order had been disobeyed by the defendant, and the Court fined him 500*l.* for his contempt in disobeying the order, not stating what was the order he had disobeyed. The presiding Judge at that session was Lord Chief Justice *Abbott*, and we have no doubt the order imposing the fine for the contempt of the defendant in disobeying the order was very carefully prepared. It is set out in full in the report in 11 Price, and it is an authority to shew that that Court at that time, Lord Chief Justice *Abbott* being the presiding Commissioner, claimed to act and

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(a) 4 B. & Ald. 218; 11 Price, 70.



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did act as a superior Court, not setting out the particular of the contempt it proposed to punish. Indeed Baron Wood's judgment (p. 87) expressly speaks of it as a superior Court of record. Assuming, therefore, that the Court of assize is a superior Court, the law applicable to its commitments is not open to doubt. It was solemnly decided in the House of Lords in *Burdett v. Abbott* (a), as it had been in the Court below (b) and in *The Case of the Sheriff of Middlesex* (c), that in a warrant of commitment by a superior Court the adjudication of contempt may be general and the particular circumstances need not be set forth.

This is all that is necessary for the decision of this case. But we do not regret that Mr. Bovill brought under our notice the circumstances that took place at the trial, as it affords us an opportunity of saying that we entirely concur in the view taken by the learned Judge who presided. Mr. Justice Hill, as to the whole proceeding.

Writ refused (d).

(a) 5 Dow. 165. 200.

(b) 14 East, 1.

(c) 11 A. & E. 273.

(d) See *Ex parte Fernandes*

10 C. B., N. S. 3.

May 1.

WESTHEAD and Others v. SPROSON and PIPER.

P. being indebted to the plaintiffs, the defendants gave them the following guarantee:—

"In considera-

tion of your agreeing, at our request, from time to time to supply on credit to P. such goods as he may require and you may think fit to supply, we do hereby guarantee to you the payment of such sum as he now owes and may at any time, from time to time, owe to you."—Held, that the guarantee did not contain any binding agreement on the part of the plaintiffs to supply goods to P., and that as they never did supply any goods to P. after the date of the guarantee, the defendants did not become liable to pay the existing debt of P.

**DECLARATION.**—That on the 23rd of April, 1860, the defendant made and signed and delivered to the plaintiffs a guarantee in the words and figures following, that is to say:—"To Messrs. J. P. and E. Westhead & Co., &c



Gentlemen—In consideration of your agreeing, at our request, from time to time, to supply, on credit, to W. Piper such goods as he may require and you may think fit to supply, we, William Sproson and Joseph Piper, do hereby guarantee to you the due and regular payment of such sum and sums of money as he now owes, and may at any time and from time to time owe to you, on any account whatsoever, so that we shall not be answerable for more than four hundred pounds in respect of his dealings with you; and we give you full liberty to extend the period of credit to the said William Piper, and to hold over or renew any bills, notes or other securities you may at any time hold, and to grant him and the persons liable upon such bills, &c., any indulgence, &c. This guarantee to continue good notwithstanding any change in the parties constituting your firm. Dated, &c. Wm. Sproson, Joseph Piper.” That the persons to whom the said guarantee was addressed were and are the plaintiffs, and that the names William Sproson and Joseph Piper attached to the said guarantee were and are the names of the defendants. That although the plaintiffs thereupon accepted the said guarantee accordingly, and were always ready and willing, as the defendants well knew, to supply from time to time the said W. Piper on credit such goods as he might require, according to the terms of the said guarantee, and although at the time of the giving the said guarantee the said W. Piper owed to the plaintiffs, and there was then due and payable from him to the plaintiffs a large sum of money, to wit 400*l*., which said sum the said W. Piper ought to have paid to the plaintiffs before suit, and although the defendants before suit had notice of the premises and were requested by the plaintiffs to pay them the said sum of money, to wit 400*l*., yet the defendants made default in paying such sum, and a part thereof, to wit 300*l*., is still unpaid, &c.

Demurrer and joinder therein.

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*Phipson*, in support of the demurrer.—The claim against the sureties is for payment of monies due when the guarantee was given; but there is no consideration to support a promise to pay the past debt. It is not shewn that any new credit was given. The supposed consideration is the agreement. [*Pollock*, C. B.—This is not such an agreement on the part of the plaintiffs as the law can enforce. It amounts only to an agreement to treat.] The words “such as you may think fit to supply,” make the supply entirely optional on the part of the plaintiffs; therefore, if there is an agreement at all, it is only an agreement to supply just what the plaintiffs may please. In *White v. Woodward* (a) the guarantee was similar in its terms to that in the present case, but there the plaintiff supplied goods. In the course of his judgment *Cresswell*, J., said—“I think that a sufficient consideration is disclosed on the face of the guarantee, and that it imports that the continued supply should be *bonâ fide* and to a reasonable extent.” But this observation was not necessary to the decision, which is explained by *Martin*, B., in *Broom v. Batchelor* (b), who said that the writing in *White v. Woodward* (a) was construed as meaning “That, conditionally, on a real and *bonâ fide* future credit to be given by the plaintiff, the defendant contracts to guarantee.”—(He referred also to *Taylor v. Brewer* (c), and *Bryant v. Flight* (d): Per *Parke*, B.)

*Mellish* (with whom was *John Henderson*), for the plaintiffs.—The consideration is not the supply of goods, but the entering into an agreement to supply them. The making such agreement is a perfectly valid consideration. *White v. Woodward* (a) is in point. In the course of the

(a) 5 C. B. 810.

(b) 1 H. & N. 255. 263.

(c) 1 M. & Sel. 290.

(d) 5 M. & W. 114.



argument in that case it was suggested that there was no agreement to supply goods. *Wilde, C. J.*, answered:—“Yes, there is. The *amount* is discretionary, but not the supply;” and it is evident that his judgment proceeds mainly upon that ground. In the present case, the fair meaning of the instrument is, that the plaintiffs bind themselves to go on dealing with W. Piper as they had done before; and the words “may think fit to supply” are inserted merely to give them the power of refusing if they have a reasonable ground, as, for instance, if W. Piper became insolvent. In *Oldershaw v. King (a)* the agreement was “in consideration of your forbearing to press for immediate payment;” and it was held that the promise was not too vague to constitute a consideration.—(He also referred to *The Liverpool Borough Bank v. Eccles (b)*).

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POLLOCK, C. B.—We are all of opinion that, upon the true construction of this document, the plaintiffs entered into no binding agreement to supply goods to W. Piper. We must therefore construe the guarantee as being conditional, so that, in the event of the plaintiffs thinking fit to supply and supplying goods to W. Piper, there would be a performance of the condition, and the defendants would be bound, but not otherwise. This makes the agreement sensible and intelligible. The substance of Mr. Mellish’s argument was that, inasmuch as the parties meant to agree to supply, we must put such a construction on the document as to make it a mutual agreement. But I have no doubt that what the plaintiffs meant in saying, “we agree to supply,” was to give a sort of colour to the promise to pay the existing debt, but without being under any obligation to supply any more goods.

(a) 2 H. & N. 399; S. C. in Error, Ib. 517.

(b) 4 H. & N. 139.



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MARTIN, B.—I also think that this document did not bind the plaintiffs to supply any goods. If the words are transposed thus:—"In consideration of your agreeing to supply W. Piper such goods as you may think fit and he may require," it becomes manifest that the supply is to depend entirely on the will of the plaintiffs, and that is no consideration for an agreement.

BRAMWELL, B.—If it appeared that the plaintiffs agreed to do anything of value, there would be a good consideration for the guarantee. But the words "such goods as he may require," may be left out, because of course the plaintiffs could not supply any other. Then, striking out those words, what remedy would the defendants have on the supposed agreement for the non-supply of goods for a month or a year: what damages could they get? The only difficulty which I have arises out of the case of *Oldershaw v. King* (a). If it is possible to find out what is a reasonable time, I do not see why we should not be able to discover what is a reasonable supply of goods.

WILDE, B.—I think that the true meaning of this instrument is, that if the plaintiffs supplied goods to W. Piper the guarantee should attach, but not otherwise.

Judgment for the defendants.

(a) 2 H. & N. 399; S. C. in Error, Ib. 517.

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THE ATTORNEY GENERAL *v.* SIR FREDERICK WILLIAM  
POTTINGER, Baronet.

April 24.

**I**NFORMATION against the defendant, the executor of Sir Henry Pottinger, Baronet, deceased, for payment of legacy duty in respect of the testator's personal estate.

2. The testator died at Valetta, in the Island of Malta, in March, 1856.

3. He was the son of Irish parents, and born in Ireland, and remained in the United Kingdom till 1804, when he went to India as a cadet in the East India Company's Military Service, in which he continued down to the time of his death.

4. During the latter part of his residence in India he was employed as political Resident at different Native courts, and for his services in that capacity was made a baronet in 1836.

5. He continued to reside in India down to the year 1840, when he left Bombay (the presidency to which he was attached) and came to England (having attained the regimental rank of colonel in the Company's service), and

P., who was the son of Irish parents and an officer in the military service of the East India Company, on the Bombay Establishment, returned to England in 1840, having attained the regimental rank of colonel. By the regulations of the service officers who have attained that rank were permitted to reside where they pleased, subject to the Company's orders for their return to duty in India. P. continued in the service of the

Company until his death. In 1841 he was appointed by her Majesty as Plenipotentiary in China, and accepted this appointment with consent of the East India Company. On his return in 1844, having been made a Privy Councillor, he purchased the ground lease of a house in Eaton Place, which he furnished and fitted up for his residence and resided there. Soon afterwards he was appointed Governor of the Cape of Good Hope, where he continued until 1848, when he was appointed Governor of Madras. He resided at Madras until 1854 when he returned to his house in Eaton Place, but afterwards went to other places in England and ultimately to Malta, where he died. In his will and codicils he described himself as "of Eaton Place." During the last period of his life he frequently declared his intention of returning to India.—*Held*, that the fact that P. continued in the service of the Company and was liable to be ordered to return to India did not prevent him from acquiring an English domicile on his return from China: that his subsequent residence as Governor at the Cape of Good Hope and at Madras did not involve the loss of his English domicile; and that, as he had acquired an English domicile on his return from China in 1844, subsequent expressions of intention to return to India, and even the going to Malta with the view of ultimately returning there, did not affect the domicile he had acquired in England.



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though he afterwards went out to India as Governor of Madras, he never returned to Bombay.

6. Officers who have attained the regimental rank of colonel in the Company's service are permitted to reside in this country on furlough, under the regulations contained in the despatch of the Court of Directors of the Company, dated the 25th of April, 1853, of which the following is an extract:—"That the officers last mentioned" (viz., colonels of regiments of infantry and cavalry, and of the battalions of artillery), "be allowed to reside in Europe with their shares of off-reckonings and pay, subject always to the Court's orders, for their return to duty in India." And Sir James Melville, the late Secretary of the Company, in a letter dated the 16th of July, 1857, written by him by the authority of the court to J. Timm, Esquire, the Solicitor of Inland Revenue, enclosing a copy of the said extract, states as follows:—"I am desired to add, that officers so situated are eligible to be permitted to return to their duty in India, and that should they or any other officer, when on furlough in this country, refuse to obey an order issued by the Court of Directors for their return to duty in India, they would be liable to be brought to trial by court martial."

7. In 1841 the testator was sent by her Majesty to China as Plenipotentiary and Envoy Extraordinary from this country to the Chinese court. The defendant says that the testator accepted this appointment with the consent of the East India Company; and as evidence thereof, on inquiry being recently made on the subject at the East India Office by the defendant's solicitors, they received in reply the following letter:—"India Office, 16th Oct. 1860. Gentlemen,—I am directed by the Secretary of State for India in Council to acquaint you, in reply to your inquiry, that although nothing can be traced on the official records in proof that the late Sir H. Pottinger accepted the appointment of her



Majesty's Plenipotentiary to China in August 1861, with the consent of the late Court of Directors of the East India Company, there can be no doubt that the Chairman of the Court of Directors, in accordance with the practice in such cases, was consulted with regard to such appointment and assented thereto. The gentleman who filled the office at that date is not living. Sir H. Pottinger attained the rank of Major General on the 23rd of November, 1841, and as officers of that rank in the India armies can reside where they please, it is not necessary that he should apply for leave of absence from India. I am, Gentlemen, &c., W. E. B. Colonel."

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8. The testator remained in China in the capacity of her Majesty's Plenipotentiary there down to the year 1844, when he returned to England. In November 1844 he was sworn a member of her Majesty's Privy Council, and a pension of 1500*l.* a year was soon afterwards granted to him by the Crown for his services in China.

9. Upon his return from China he purchased the ground lease of a dwelling-house in Eaton Place, which he furnished and fitted up for his residence and resided there until he again left England. Upon his leaving England the said dwelling-house, with the furniture therein, was let as a furnished house during his absence.

10. Not long after his return from China he was appointed Governor of the Cape of Good Hope, which appointment he immediately accepted and forthwith proceeded there. It does not appear that the consent of the East India Company was asked for his acceptance of the appointment, or that he in accepting it contravened the rules of the service. He remained at the Cape as Governor down to the year 1848, when, having been appointed by the East India Company to be Governor of the Presidency of Madras, he left the Cape of Good Hope and proceeded to Mádras. He



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held the office of Governor of Madras and continued to reside there down to the year 1854, when his term of service having expired he left India, and returned in the same year to England in shattered health, his departure from India having been delayed for some time in consequence of the death on his way to India of the Governor appointed to succeed him.

11. The testator remained in England from June 1854 to September 1855. He went first to his house in Eaton Place, but afterwards, with the view of improving his health, to other places in England, and ultimately to Malta.

12. On the 17th of July, 1855, during the time he was in England, he made his will, describing himself therein as "The Right Honorable Sir Henry Pottinger, Baronet, Lieutenant General, G.C.B., and Privy Councillor, of No. 67, Eaton Place, in the county of Middlesex."

13. The testator while at Valetta, in the island of Malta, whither he proceeded sometime in the autumn of 1855, made two codicils to his will. The first of such codicils, dated the 26th of December, 1855, purports to be executed by the testator, who is described therein as "The Right Honorable Sir Henry Pottinger, Baronet, Grand Cross of the Bath, one of her Majesty's Privy Councillors, now residing at this island of Malta," in the presence of a Notary Public and other witnesses, according to the law of Malta. The other of such codicils is dated the 26th of January, 1856, and the testator is therein described as of "No. 67, Eaton Place, London, Baronet, G.C.B., and one of her Majesty's Privy Council, and now residing in the city of La Valetta, in the island of Malta." Such last mentioned codicil was executed by him and attested by five witnesses, according to the law of Malta, and he thereby appointed certain persons executors of his will jointly with his eldest son the defendant. He died at La Valetta in the month of



March following, holding at the time of his death the rank and commission of a Lieutenant General in the Company's service.

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14. The defendant alone proved the testator's will, &c., but has not paid legacy duty thereon, having been advised that the testator by his residence and service in India, and holding a commission to the day of his decease in the East India Company's service, acquired a foreign or Indian domicile which he never afterwards lost, and that consequently no duty is payable.

15. The defendant says it was the testator's wish and intention, during his last stay in England, to return to India. And, as evidence thereof, on the 17th of June, 1854, the testator wrote a letter to his son-in-law, R. Stephens, in which, after dwelling on some unpleasant matters, he said, "I shall arrange my affairs to go back to India, where I can keep aloof from all such annoyances and miseries." And on the 27th of April, 1855, in a letter to his daughter, he said, "I still cling to the hope (a faint one I admit), that I shall benefit by the change that we may expect in the summer; if not, I have finally resolved to give up my house, and go abroad for good." And he frequently declared his intention of returning to reside in India; and even during his stay in Malta, a short time previously to his death, expressed the probability of proceeding thither in the ensuing spring.

16. Although the testator, in manner aforesaid, expressed his wish or intention to return to India, he never in fact gave up his house in Eaton Place.

Prayer (inter alia).—That it may be declared that the testator was domiciled in England at the time of his death, and that legacy duty is payable to Her Majesty in respect of his personal estate, &c.

The defendant, by his answer, admitted the truth of the



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statements in the information, but alleged that the testator was domiciled in India at the time of his death, relying on the statements in the information, and certain declarations contained in a schedule annexed, viz. :

Declaration of R. Stephens, son-in-law of the testator. I have frequently heard Sir H. Pottinger assert, that he would leave England and return to India, not only on account of domestic unhappiness and miseries which oppressed him, but also from his preference for a country where he had lived more than half a century. His letter to me on leaving India, shewed his reluctance to return to England; and during the fourteen months he passed in that country, from June, 1854, to September, 1855, he was constantly wishing to return to India. And I firmly believe that one of the chief reasons which induced him to select Malta as a winter residence for the benefit of his health was, that in the event of his recovery, he should be able to go with greater facility to proceed to India.—The testator's daughter confirmed this, and stated, "I have frequently heard my father declare his intention of returning to reside in India: and even during his stay at Malta he expressed the probability of proceeding thither in the ensuing spring. The testator's sister-in-law and wife made a declaration that during his last stay in England he had declared his intention of returning to India. And his solicitor made a declaration that to the best of his recollection, he never heard from Sir H. Pottinger a single observation leaving him to suppose that Sir H. Pottinger had relinquished the idea of returning to India.

*The Attorney General and The Solicitor General* (with whom were Sir F. Kelly, Mellor, and A. Hanson), argued for the Crown.—Sir Henry Pottinger was born in Ireland, therefore that country was his domicile of origin. He subsequent



acquired an Indian domicile, but he returned from India after having obtained the regimental rank of colonel. It appears from the information and answer, that officers who have attained that rank are allowed to reside where they please, unless specially commanded to return to their military duties in India. The domicile of a person generally depends upon his voluntary choice and his own act in setting up his tabernacle in a particular place, but there is an exception with respect to officers in the military and naval service of the country, where there is an obligation to reside in a particular part of the empire. In such cases domicile does not result from the voluntary choice of the party. In the case of officers in the East Indian service, the ground on which it has been held that they are domiciled in India, is that they are under an obligation of being with their regiment in India: *Munroe v. Douglas*, (a) *Bruce v. Bruce* (b). After they have attained the regimental rank of colonel, when the obligation of continuing with their regiment ceases, the reason for the rule ceases, and they are restored to perfect competency to elect a permanent place of abode; that is, in other words, they are at liberty to set up their domicile anywhere they please. The question then is, whether, when the testator came home and established himself in England, he did so *animo manendi*, that is, with the intent of remaining an indefinite time. In *Craigie v. Lewin* (c) the deceased, a native Scotchman, who had by employment in the military service of the East India Company acquired a domicile in India, having attained the rank of lieutenant colonel, returned to Scotland on furlough, and in determining the question of his domicile, *Sir Herbert Jenner Fust* said that the question was, "did the deceased, when in 1837 or in 1839 he went to Scotland, go there *animo manendi*,

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(a) 5 Madd. 404.

(b) 2 Bos. & P. 229, n.

(c) 3 Curt. Eccl. Rep. 435.



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or did he merely go there to remain so long as the rules of the service would permit, and no longer?" And upon the facts he decided that the deceased was here for a temporary purpose only. Upon this principle it is submitted that Sir Henry Pottinger did acquire a domicile in England in 1844. He came back from China, accepted the office of a Privy Councillor, purchased a house in Eaton Place, and furnished it. That was a conclusive step. His connection with the East India Company had ceased, except that he was a Major General. As a member of the Privy Council he became liable at all times to be called upon to serve her Majesty in this country. He was afterwards appointed Governor of a colony. This however is a temporary office, ordinarily held for a period of six years. No man loses or acquires a domicile by the acceptance of such a temporary appointment. The acceptance of such an office implies the existence of an "*animus redeundi*." It is a general principle in the law of domicile, that the acceptance of a diplomatic or other office in the service of the Crown, to perform the duties of which a party leaves his country, does not at all affect the domicile he has at the time. [*Pollock*, C. B.—In the case of a diplomatic employment the residence of the ambassador is deemed part of the dominions of his master.] There is no evidence to shew that Sir Henry Pottinger ever lost his English domicile. He returned to his home in Eaton Place, where, but for the state of his health, he would have continued to reside; and he died at Malta, whither he had gone for relief. The testator appears to have expressed some intention of returning to India; but expressions of intention to return to a particular place are of no avail for the purpose of changing the domicile, unless the party acts upon and fulfils his intention. If, instead of merely expressing his intention in words, the testator had broken up his establishment, discharged his servants, sold his house



in Eaton Place, and died on board ship on his return to India, it would not have been enough to revive his Indian domicile. *Lyll v. Paton* (a).

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*Bovill* and *Trevor*, for the defendant.—Sir H. Pottinger lost his domicile of origin by entering into the Indian service and acquired an Indian domicile. The ground on which the testator's Indian domicile rests appears from *Craigie v. Lewin* (b), the marginal note of which is as follows:—"A native Scotchman having, by employment in the military service of the East India Company, acquired a domicile in India; held, that by his return to Scotland, *animo manendi*, his original domicile did not revive, the party still holding his commission and being liable to be called upon to return to India, and intending to return if called upon to do so." [*Pollock*, C. B.—The case is rightly decided, but the marginal note is wrong. The ground of the decision was that the deceased had *not* returned to Scotland with the intention of residing there permanently.] It is for the Crown to shew affirmatively that the intention of the testator was *not to return* to his duty in India. Though absent on leave he was liable to be ordered to serve in India. [*Pollock*, C. B.—As a privy councillor he was bound to be in attendance on her Majesty.] In *Cockrell v. Cockrell* (c), the testator, an officer in the English Navy on half-pay, had obtained leave of absence and was residing in India: it was held, that whether the testator was domiciled in India or not depended upon the question whether he had the *animus manendi*. But there the only effect of absence without leave, would have been that the testator would have forfeited his half-pay. Here, Sir H. Pottinger might have been tried by a court martial for disobedience if he had refused to

(a) 25 L. J. Chan. 746.

(b) 3 Curt. Eccl. Rep. 435.

(c) 25 L. J. Chan. 730.



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return to India when ordered. That liability was adverted to by the Court in *Hodgson v. De Beauchesne* (a), where Lord Lushington said—"Any officer after twenty years' service may retire on the full pay of his rank. But Colonel Hodgson did not retire." Neither did Sir H. Pottinger in the present case. It should be observed that Colonel Hodgson was a full colonel. There is a presumption that an officer will not relinquish or abandon the intention of returning to his duty. The fact that Sir Henry Pottinger asked, and obtained the consent of the East India Company before going to China, affords strong evidence of his intention to continue subject to their orders, and consequently not to abandon his Indian domicile. In *The Attorney General v. Dunn* (b), what the testator did in purchasing and furnishing a residence in the Papal States was stronger evidence of intent to acquire a new domicile than what took place here with respect to the house in Eaton Place. That case shewed that the mere fact of the purchase of a residence amounted to very little, unless there is an intention to abandon the previous domicile. That also appears from *Munro v. Munro* (c). In 1848 the testator was appointed Governor of Madras having, as it is submitted, down to that time an Indian domicile. Suppose he had died in India in or prior to 1853, could it be said that he had an English domicile. The Governor is not merely a civil officer; he has authority as a military commander in the absence of the Commander-in-Chief. As such Governor Sir H. Pottinger was in the service of the East India Company. [*Pollock, C. B.*—Suppose before he went to Madras he had acquired an English domicile, is it contended that he lost it by accepting the appointment of Governor?] It is submitted that while on the one hand there is an entire absence of evidence of any

(a) 12 Moo. P. C. 285.

(b) 6 M. & W. 511.

(c) 7 Cl. & F. 842. 850.

intention to abandon the Indian domicile, on the other there is evidence of the testator's intention to return to India. Reliance has been placed on the testator's description of himself in his will, but this description was unnecessary and cannot affect the question. In *Whicker v. Hume* (a), the testator described himself as "of the city of Edinburgh, but now residing at Paris." Lord *Langdale* said, that "no description which the testator could have given of himself would by itself have had any effect in determining his domicile." In *Re Steer* (b) shews that no new domicile can be acquired by the animus without the factum, and, by parity of reasoning, the mere change of residence, without the animus, is not sufficient to establish a new domicile.

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The Attorney General was not called upon to reply.

POLLOCK, C. B.—The question is, whether Sir Henry Pottinger at the time of his decease was domiciled in England or in India. I am of opinion that he was domiciled in England. The only question that can be raised is, whether he acquired an English domicile on his return from China in 1844, when he took a house and furnished it, accepted honours from the Crown and placed himself in a situation to acquire an English domicile, if he was capable of doing so. It is clear that if an English domicile was acquired by him when he returned from China he did not afterwards lose it; for his appointment as Governor of the Cape of Good Hope would not involve the loss of an English domicile. And I am of the same opinion with respect to his acceptance of the office of Governor of Madras, for it was an appointment which might have been conferred upon any civil servant of the Crown, and had no connection with his military duty. There is no evidence that the testator, in going to Malta, had any intention to abandon

(a) 13 Beav. 366. 400.

(b) 3 H. & N. 594.

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his English and resume his Indian domicile. The question then comes to this, whether he acquired an English domicile by what took place on his return from China in 1840. Supposing he had ceased to be a general officer in the Indian service there could have been no doubt about his domicile. The only doubt arises from this, that he continued in the service of the East India Company and might have been called upon at any time to serve in India. In *Hodgson v. Beauchesne* (a), which was cited to establish that, because an Indian officer continued liable to be called upon to serve in India he could not acquire an English domicile, the Court decided that such circumstances constituted a strong reason against such an officer acquiring a *French domicile*. But the distinction between a *foreign* and an *English domicile* is pointed out in the judgment, and Lord Cranworth in the course of Dr. Phillimore's reply, said:—"If the deceased had gone to Scotland on furlough, and resided there as long as he did in France, it would be difficult to say that he had not acquired a Scotch domicile." Applying this to this case, I think that, notwithstanding Sir Henry Pottinger continued in the Indian army, his purchase of a dwelling house in Eaton Place, his continuing to hold it whilst absent from England, his return to it as his place of residence and his home, and his reference to it in his will as his residence abundantly establish his English domicile. Having once acquired it he did nothing to lose it, and the Crown is therefore entitled to legacy duty on that footing.

MARTIN, B.—I am of the same opinion. For the purpose of enabling us to say that Sir Henry Pottinger renewed his British domicile, we must be satisfied that when he returned to England in 1840, he came home with the intention of spending the rest of his life in England. We have no doubt, that if called upon at any period he would

(a) 12 Moo. P. C. 285.

have gone to India. But I think that state of mind did not affect his intention, after having spent thirty-six years of his life in India, to return home and spend the rest of his days with his wife and family in this country. There would have been strong evidence for a jury that he came back to remain here though liable to be ordered to return to India. He had acquired a high reputation and attained great eminence, and might fairly have expected to be employed in the public service. He was made a Major General in 1841. It may be that this rank gave him a right to remain in England. However I will assume that it did not; that he might have been called upon to return to his duty in India, and that he would have gone back if called upon. He remained in England until 1844, and while here bought the lease of a dwelling-house. I agree that the mere purchase of a house may be an ambiguous act, and in many cases a very immaterial circumstance in considering the question of domicile. But I think it was not so here. After this he was appointed Governor of Madras; that, as I collect from a statement in paragraph 10, was an appointment for a fixed time. He remained there during his term of service and then returned to England. Mr. *Bovill* contended that there was nothing to shew that he did not resume his Indian domicile. He went there as much an Englishman as Lord Elgin did, who at one time held the same appointment. In his last will he describes himself as "Privy Councillor, of No. 67, Eaton Place, Belgrave Square, in the county of Middlesex." Perhaps this taken alone is not a matter of great weight, and under some circumstances is of hardly any importance. But coupled with the other circumstances of the present case, it is almost as strong a declaration as he could make, that he was "Sir Henry Pottinger, Baronet, &c., of No. 67, Eaton Place, in the

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county of Middlesex," temporarily residing in the I of Malta. There is, therefore, a strong declaration very solemn matter of his own view of his domicile would be cogent evidence to lay before a jury that come back to England to resume a British domicile and I cannot doubt that such was his intention, that he may have meant, if called upon to serve, to return to India. It was urged that there are circumstances in the case to shew the contrary. I can understand that in unpleasant circumstances had occurred which induced H. Pottinger to form an intention of leaving the place where he was subjected to annoyance of a painful character but such intention is nothing like a change of domicile. On another point I felt some difficulty until *The Solicitor General* referred to the case of *Lyall v. Paton* (a), because I am in doubt whether the testator intended to go back to India when he went to Malta.

BRAMWELL, B.—I think that this is a plain case. The question is where was the testator domiciled at the time of his death, and to determine that we must first ascertain the facts, and then the intent of the testator. The testator returned from China in 1844, when he purchased a house at Eaton Place, Belgrave Square, as his permanent residence and furnished it. If the testator had not been in the service of the East India Company, if he had been a merchant and there had been no evidence of subsequent intention to change his domicile, there would have been no doubt about the case—we should have had the factum with the intention. But I agree with Mr. Bovill that we must look to all the facts down to the last moment of his life. I will assume that the testator might have been ordered to return to India

(a) 25 L. J. Chan. 746.

and we ought not to infer that he would do anything contrary to his duty. In *Hodgson v. De Beauchesne* (a) the Court held that if a general officer in the East India Company's service established a domicile in France, it would be inconsistent with the duty which required him to be where he could be called upon. But, as the Lord Chief Baron has shewn, that doctrine does not apply if the domicile to be acquired is in England. Would it have been in any respect contrary to the duty of Sir Henry Pottinger to establish a domicile in England? I think certainly not; because, by the rules of the service, he was at liberty to come back to England and reside there. Therefore the reason in the case referred to has no application here. It is evident therefore to my mind that had Sir H. Pottinger died before he went to Madras, we should have had the factum and the intention clear without any difficulty. With respect to the intention, I think that it is a mistake to suppose that a person must absolutely intend one of two things; it may be that he has no absolute intention of doing either. In the present case it may be that the testator did not contemplate going back to India. If suddenly appealed to he might have said, "I never thought of it." But it is very likely he may have intended to do so if an occasion arose. But many a man may have in his mind an intention to do what would be very much for his benefit, as, for instance, to accept high office abroad, if the occasion should arise, but would that prevent him acquiring a domicile here? I can easily understand that Sir Henry Pottinger contemplated the possibility of his being again employed in India; but that is immaterial. He intended to reside here, where he had taken up his residence *permanently*, or (as I should perhaps say with the Attorney General, as being a more

(a) 12 Moo. P. C. 285.

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correct expression than that which I used in *Steer's Case* for an indefinite time. That he had abandoned his domicile is manifest from the fact that he had accepted the office of Governor of the Cape of Good Hope. If evidence had stopped there, it would appear that when he originally returned to England and came to reside in London Place he intended to remain an indefinite time; so that there would have been the factum and the intention without any evidence to the contrary. There is no evidence of any intention to return to India until 1855, and some family differences appear to have arisen. Then what he says in 1855 indicate what was his intention in 1854? I think not. I infer from his letters that circumstances had arisen, and the expressions contained in them do not indicate any original intention not to return to India for an indefinite time in this country. He says, "I will arrange my affairs and go back to India." I do not believe that he went to Valetta with the intention of returning to India, though he may have thought that if he did return he would be nearer to India at Valetta. I think that there was both the factum and the intention to establish an English domicile. Mr. Bovill ingeniously suggested that, taking separately each fact which goes to establish this, there is little or nothing in it. That may be true, but the facts taken altogether are strong evidence. Bovill asked, "If Sir Henry Pottinger had died at Madras would he have had an English domicile?" To that question the answer, yes. He had acquired an English domicile in 1848 and the acceptance of the Governorship of Madras did not affect it. I think that he had no final intention to abandon his English domicile, and that there is no evidence of the factum and the intention of changing it for an Indian domicile.

Decree accordingly.

(a) 3 II. & N. 594.

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TUPLING v. WARD (*a*).

Feb. 25.

T. JONES, in last Hilary Term, had obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to exhibit interrogatories to the defendant, pursuant to the Common Law Procedure Act, 1854.

The declaration stated that the plaintiff was an accountant, and that the defendant, intending to insult the plaintiff and bring him into contempt, and to cause people to believe that he was an hypocritical, fraudulent, tricky and contemptible person composed and published of and concerning the plaintiff, as such accountant, in the form of an article called "Cheating the Gallows," contained in a book called "The Diary of an Ex-Detective," the false, &c., matter following:—"Cheating the gallows" (setting out the libel, which ended with the words) "At any rate Tupling had succeeded in cheating the gallows," &c.

In an action for libel, the Court will not permit the plaintiff to exhibit interrogatories to the defendant, the answers to which, if in the affirmative, would tend to shew that he composed or published the libel, and would therefore criminate him.

The defendant was the publisher of the book in question, and the interrogatories proposed to be administered were as to whether the defendant had composed the article complained of; whether he knew who composed it; whether "Charles Martel," the name on the title page, was real or fictitious; whether the defendant had been, or expected to be, indemnified; with other questions of that kind.

Joseph Phillips shewed cause (*b*).—The questions proposed in this case are such that, if answered in the affirmative, the answers would expose the defendant to a criminal prosecution. It is now established that interrogatories can only be admin-

(*a*) Decided in last Hilary Vacation.

(*b*) In Hilary Term, Jan. 29. Before *Martin*, B. and *Wilde*, B.

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istered in those cases in which, on bill filed, a Court of ex would enforce discovery. *Whately v. Crowter* (a), *Edu v. Wakefield* (b), *Moor v. Roberts* (c). If the interrogat are objectionable on the ground that they do not fall wi this rule, they must be altogether disallowed. No covery could be obtained in equity in aid of an actio libel. A bill filed for that purpose, would be demurra Mitford's Pleadings in Chancery, 194, 5th ed. No argun can be founded on the practice at nisi prius of puttin question to a witness and allowing him either to ans it or not as he thinks fit, because the 51st section of Common Law Procedure Act, 1854, refers to discovery equity. If it be contended that the statute contemph that the defendant may refuse to answer in a case like present, and if reliance be placed on the expression t "any party or officer omitting, *without just cause*, sufficien to answer all questions as to which a discovery may sought," shall be deemed to have committed a contempt, answer is, that this provision was probably meant to ap to cases in which interrogatories, proper in themselves, ha been exhibited, but where, from some cause within his or knowledge, the party interrogated may be entitled to refi to answer. [*Martin*, B.—Many of these questions : wholly irrelevant in an action against the defendant, t publisher of the book.]

T. Jones, in support of the rule.—The admissibility interrogatories such as those now sought to be administer to the defendant was decided in *Osborn v. The Lond Dock Company* (d), and that case has never been overrule It was an action of detinue and trover for wine and casl Interrogatories were allowed, the object of which was shew that the defendants had a defence to the action

(a) 5 E. & B. 712.

(c) 2 C. B., N. S. 671.

(b) 6 E. & B. 464.

(d) 10 Exch. 698.

the ground that fraudulent practices had been resorted to with respect to the substitution, by third persons, of other wine in the place of that deposited with the defendants, and that the plaintiff was a party to the fraud. Notwithstanding an affidavit by the plaintiff's attorney that if the plaintiff was a party to such proceedings he would be liable to be indicted for the same, *Alderson*, B., said:—"The proceeding is analogous to that of the examination of a witness at a trial at nisi prius. It seems to me that the same rule should be followed." *Parke*, B., said:—"The plaintiff must be put on his oath, and when he finds any question pinch him, he must object to it." And, again, *Alderson*, B., said:—"If the law be that laid down in *Fisher v. Ronalds* (a), his (plaintiff's) bare statement that the question has such effect will be a sufficient objection to the question. The system introduced by this statute is an improvement upon the method of proceedings by bill of discovery." The language of the latter part of the 51st section expressly indicates that such is the proper mode of objecting to questions which tend to criminate. The 50th section is not limited to cases where the party is entitled to the production of documents for the purpose of discovery. Its language is "for the purpose of discovery or otherwise." In *Boyle v. Wiseman* (b) it was held that a party to a suit cannot object to be sworn and examined on the ground that the only relevant question which could be put to him would tend to criminate him, but must be sworn, and on his oath claim his privilege. [*Keane*, amicus curiæ, referred to a case of *Simpson v. Carter* (c), where, in an

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(a) 12 C. B. 762.

(b) 10 Exch. 647.

(c) Q. B. Mich. Term, Nov. 16, 1857. There is no report of this case; but the *Law Times*, vol. 30, p. 133, contains the following notice of it:—

"*SIMPSON v. CARTER*.—*Edwin James*, for the plaintiff, consented to answer interrogatories proposed.—*Sir F. Theigier* and *Keane*, contra."—That was probably so, or the case would have been reported.

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action for slander, the Court of Queen's Bench allow interrogatories to be administered to a plaintiff, leaving to him, if he thought fit, to refuse to answer, Lord Campbell, C. J., saying that the plaintiff might be glad of opportunity of denying upon oath the offences imputed him. *Wilde, B.*—There is a distinction between the language of the 50th and 51st sections. In the 50th it "to the production of which he is entitled for the purpose of discovery or otherwise;" in the 51st, "as to which discovery may be sought."—He also referred to *M' Mahon Ellis and others (a)*.] The answers will be material with respect to the question of damages, and the plaintiff is entitled to have the benefit of the defendant's refusal to answer.

Cur. adv. vult.

MARTIN, B., now said.—We have considered this matter and are all of opinion that the rule ought to be discharged.

The action is for a libel, published in a book called "The Diary of an Ex-Detective," in which it was alleged that the defendant had imputed to the plaintiff some grave offence. It was proposed to administer to the defendant a number of interrogatories as to whether he composed the article complained of, whether he knew who composed it, whether the name on the title page was real or fictitious, whether he had been, or expected to be, indemnified; with other questions of that kind.

We are all of opinion that, in the exercise of the authority and discretion given to us by the 51st section of the Common Law Procedure Act, 1854, such interrogatories ought not to be allowed. It was scarcely contended that the defendant was bound to answer them; but it was urged that the interrogatories ought to be administered, leaving the defendant to refuse to answer if he thought fit.

Without laying down any general rule on the subject, I

(a) 10 Irish Com. Law Rep. 120.

think that, in cases of this kind, it would be unfair to submit questions which a party is clearly not bound to answer; the object being either to compel him to answer when not bound, or to refuse, and so create a prejudice against him. We therefore think that these interrogatories ought not to be allowed.

It may be that some of them are free from objection, but the Lord Chief Baron, in delivering judgment in a case in this Court (a), said that the parties must come with proper interrogatories, and not require the Court to select from a large number those which ought to be allowed; the practical effect of such proceeding being that the party generally gets much more than he is entitled to.

Rule discharged.

(a) *Robson v. Crawley*, 2 H. & N. 766.

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THE QUEEN, on the prosecution of MAPPIN and another, April 29.
 Respondents, YOULE, Appellant.

THIS was an information by E. Mappin and J. C. Mappin, of Sheffield, cutlers, against Robert Youle; for that

By memorandum in writing Y. agreed to serve M. as a cutler for three

years, and M. agreed to employ him and pay him for his work according to a schedule of prices. Having quitted his service during the term, he was convicted under the 4 Geo. 4, c. 34, and imprisoned for twenty-one days, for unlawfully absenting himself from his service. After his discharge from prison he did not return to the service of M., but went and worked elsewhere. On a second information laid against him for unlawfully absenting himself from the service, it was proved to the satisfaction of the justices that on the first occasion he absented himself on account of a difference with his master as to the scale of prices; that when, after his discharge from prison, he refused to return, he was advised by his attorney that he was not bound to do so; and the justices stated that they thought it very probable that he *bonâ fide* believed what his attorney told him. The justices convicted him under the 6 Geo. 3, c. 25, for unlawfully absenting himself, and sentenced him to one month's imprisonment. On a case stated by the justices under the 20 & 21 Vict. c. 43:—*Held*, that the conviction could not be sustained.

Per *Pollock*, C. B., and *Bramwell*, B., dubitante *Martin*, B., because the defendant in refusing to return appeared to have been acting *bonâ fide* in the exercise of a supposed right.

Per *Pollock*, C. B., and *Martin*, B., dubitante *Bramwell*, B., because the provisions of the 6 Geo. 3, c. 25, s. 4, relating to this matter, are repealed or superseded by the 4 Geo. 4, c. 34.

Per *Pollock*, C. B., and *Martin*, B., dissentiente *Bramwell*, B., because the defendant having been once convicted for a departure with intent to leave his service altogether, could not be convicted a second time under the 6 Geo. 3, c. 25, s. 4.

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he did, on the 19th of December last, by memorandum in writing, contract to serve E. Mappin and J. C. Mappin as a journeyman in the business of a spring-knife cutler for three years from the 19th of December last, at and for wages, at certain prices referred to in the said memorandum; and having entered into the service according to his contract, had been, in the execution of the said contract, and otherwise respecting the same, guilty of a misdemeanor; for that he did, on the 29th day of August last, before the term of his said contract was completed, unlawfully absent himself from his said service without leave or lawful excuse, and without his said masters consent, and neglected to fulfil the conditions of the said contract, contrary to the statutes in that case made &c. and after hearing the parties &c., the justices &c., did thereupon convict the said R. Youle of having, on the 29th of August, at &c., without notice, and before the term of his said contract was completed, unlawfully, without the consent of his said masters or either of them, and without any just or lawful excuse, absented himself from his said service, and of having from thence unlawfully continued absent from such service, and of not having fulfilled his said contract, contrary to the form of the statute (6 Geo. 3, c. 25), entitled "An Act for better regulating apprentices and persons working under contract;" and did adjudge him to be imprisoned in the house of correction for the space of one month.

The defendant, being dissatisfied with this determination, as being erroneous in point of law, the justices stated a case (in substance) as follows:—

The defendant was brought before us on the 13th of September, 1860, when the following documents were put in and proved.

An agreement, dated the 19th of December, 1859,

between R. Youle and E. and J. C. Mappin: "R. Youle doth hereby hire himself to and agree to work for E. and J. C. Mappin, as a cutler, for the term of three years from the date hereof, &c., during all which time the said R. Youle shall and will diligently and wholly employ and apply himself in the service of E. and J. C. Mappin, and shall not work for nor assist any other person or persons, &c. In consideration whereof E. and J. C. Mappin do hereby hire and agree fully to employ R. Youle in the capacity and for the term aforesaid, and to pay him for the work which he shall do under this agreement," according to a statement of prices, &c. (Then came a proviso for the determination of the agreement at the end of the second year, in which case R. Youle was to pay all money he might then owe.) "Signed for self and E. Mappin. J. C. Mappin. Robt. Youle."

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Then followed an agreement stating the prices of the work,—three shillings and ninepence for fourteen knives, &c., signed by R. Youle.

It was proved that the defendant entered the service under the agreement and was absent from his service on the 29th of August, 1860, the day named in the information, and had not returned to his service after that day. That the defendant was found by one Golding, the manager of the plaintiffs' works, on the 11th of September, 1860, working at a manufactory which was not a part of Messrs. Mappin's manufactory; when, on being asked how it was he had not come to his work now that he was out of prison, he said that he had offered to pay Messrs. Mappin the money he owed them, and he thought that Messrs. Mappin ought to accept it and release him; he was "earning more money there, and did not want to return."

It was proved that, on the complaint of Messrs. Mappin, he had been committed by a justice of the borough to the

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house of correction at Wakefield, on the 3rd of August, 1860, for twenty-one days, for having absented himself from their service under the agreement; and that he had not returned to his service since he was discharged from prison.

In answer to a question put by us to the defendant, he said he would not return to Messrs. Mappins' service in consequence of his solicitor having advised him not to return.

The first warrant of committal was in substance as follows:—

To the constable of the borough of Sheffield, &c., and the keeper of the House of Correction, &c. Whereas information and complaint were, on the 1st of August, A.D. 1860, made upon oath before J. S., Esquire, &c.; for that R. Youle, of &c., did, at the borough aforesaid, on the 19th of December last, by memorandum in writing, contract to serve E. Mappin and J. C. Mappin, of &c., as a journeyman, in the business of a spring-knife cutler, for the term of three years from the 19th of December, subject to a proviso &c., at and for wages &c.; and having entered into his said service, according to his said contract, had been, in the execution of the said contract and otherwise respecting the same, guilty of a misdemeanor, for that he did, on the 7th day of July last, and still did, unlawfully absent himself from his said service without leave or lawful excuse and without his said masters' consent, and neglected to fulfil the conditions of the said contract, contrary to the statute in that case made and provided: And whereas R. Youle the day appeared before me, H. W., Esq., one of her Majesty's Justices of the Peace, in pursuance of a summons issued by J. S., Esq., for that purpose: and having examined the proofs &c., and the nature of the said information and complaint, and the respective witnesses &c., I adjudge the

same to be true, and did therefore convict him, R. Youle, of the said offence, in pursuance of the statute &c.; and I did adjudge that the said R. Youle should be imprisoned &c. and be kept to hard labour for the space of twenty-one days, and that during that time the wages of the said R. Youle should abate. These are, therefore, to command you, &c.

H. Wilkinson. (L. S.)

The defendant's attorney contended, before the magistrates, that the defendant having been before convicted, and imprisoned for absenting himself from the service of Messrs. Mappin under the agreement, and not having returned to the service after the expiration of the imprisonment, the justices had no further jurisdiction, and that the defendant could not be again convicted and imprisoned for absenting himself from the service, inasmuch as it was one offence, which had been satisfied.

The justices were of opinion that the defendant was proved to be guilty of the offence charged, contrary to the statute, 6 Geo. 3, c. 25, and that the defendant was liable to be imprisoned for not returning after his imprisonment, but, on the contrary, advisedly absenting himself from the service of his masters, and working for others, and adjudged him to be imprisoned for one month.

If the Court is of opinion that the determination is erroneous in point of law, then the determination shall be reversed, &c.

The case came on for argument in Hilary Term (Jan. 16), when the Court sent it back to the justices to be restated on the following points:—

First, whether any evidence was given before the justices to shew whether the absence of Youle, in respect of which the first conviction took place, was a temporary absence or an absence with intention not to return at all, and not to fulfil the contract; and if there was, to state it, and the conclusions they drew from such evidence.

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Secondly, whether if, on the last occasion on which he refused to return to the service, he bonâ fide believed he was not bound to return to the service in consequence of the previous conviction.

In the amended case the justices, after setting out fully some of the evidence above referred to, stated:—From the above evidence and statement we conclude that the appellant, in the first instance, absented himself from his service by reason of some difference with his masters as to the scale of prices, &c. We also conclude that if the masters had acceded to his wishes in these respects, he was willing to have returned to his work; otherwise not. We also conclude that the appellant had not decided in his own mind, before he was discharged from prison, whether, after such discharge, he would or would not return to his masters' service, or whether he would do so as the result of further proceedings against him, after taking the advice of his solicitor. Secondly: We further state that on the last occasion when the appellant refused before us to return to his service, we have no doubt he was strongly advised before us, by his attorney, that he was not bound to return in consequence of the previous conviction, and that he was fully determined to have the point settled by law if he was able to raise the funds, &c., and we think it very probable he did bonâ fide believe that to be the case which his adviser assured him was so.

Mellish, for the appellant.—First, the case as now stated by the justices shews that the appellant bonâ fide believed that upon the principles stated in the judgment of the Lord Chief Baron in *Re Baker*(a), he was not bound to return to his service. He cannot be convicted criminally for doing an act under a bonâ fide claim of right, even if he were mistaken. That appears from *Rider v. Wood*(

(a) 2 H. & N. 219. 248.

(b) 29 L. J., M. C. 1.

where the appellant had given a notice to terminate the engagement, which notice he intended to be good, and the Court held that, whether good or not, if he bonâ fide believed it to be so he could not be convicted for quitting the service in pursuance of it. [*Wilde*, B.—There the appellant believed that he had complied with his contract, not that he could break it with impunity].—Secondly, the appellant was not compellable to return to his service. In *Re Baker*(a), the Lord Chief Baron expressed his opinion that the power to enforce the contract was put an end to by a conviction for quitting the service. [*Martin*, B.—Suppose a workman who has contracted to serve for five years, quits his service at the end of three months, does not the master, by taking proceedings against him before magistrates and procuring him to be imprisoned for unlawfully absenting himself from the service, elect his remedy? Can the justices, after that, punish the servant by repeated imprisonment, for the same offence, during the remaining four years?] It would be a species of slavery if the workman were in such a position. The present conviction is under the 6 Geo. 3, c. 25, intituled “An Act for better regulating apprentices and persons working under contract.” The first section of that Act recites that “persons employed in manufactories, frequently take apprentices who are very young, and for several years of their apprenticeships are rather a burthen than otherwise to their masters;” and that “it frequently happens that such apprentices, when they might be expected to be useful to their masters, absent themselves from their service:” it then enacts that, “if any apprentice shall absent himself from his master’s service before the term of his apprenticeship shall be expired, every such apprentice shall, *at any time or times thereafter*, whenever he shall be found, be compelled to serve his master for so long a time as he shall have so absented himself from such

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(a) 2 H. & N. 219.

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service, unless he shall make satisfaction, &c., and so, *from time to time*, as often as any such apprentice shall, without leave of his master, absent himself from his service before the term of his contract shall be fulfilled;” and if he shall refuse to serve or make satisfaction, it shall be lawful for a justice to commit him for any time not exceeding three months. The language of the 4th section (which relates to artificers not fulfilling their contracts), is different, as was pointed out by the Lord Chief Baron in *Re Baker* (a). That case, however, turned upon the 4 Geo. 4, c. 34.—Thirdly, this conviction is under the 6 Geo. 3, c. 25, s. 4, but the provisions of that section are superseded or repealed by the 4 Geo. 4, c. 34, which, after reciting the former Acts, states that “it is expedient to extend the powers of the said Acts.” [*Wilde, B.*—The 6 Geo. 3, c. 25, s. 4, does not mention servants in husbandry, and it applied to all contracts whether in writing or not.] The 6 Geo. 3, c. 25, subjects the party to a term of imprisonment in no case less than one month. The 4 Geo. 4, c. 34, s. 3, enables the justices to imprison for any time not exceeding three months, and to abate the wages, *or*, to punish the offender by abating the whole or any part of his wages. The provisions of the two Acts are, in many respects, plainly inconsistent.

Quain, in support of the conviction.—In *Ex parte Baker* (b), the main point argued before the Court of Queen’s Bench was whether, under the 4 Geo. 4, c. 34, the justices had power to convict a workman a second time for refusing altogether to return to his work after he had suffered imprisonment for absenting himself. Lord Campbell said, “I think a fresh offence was committed when the prisoner, after being liberated from imprisonment, did not return to the service, because the contract continued and he absented himself; that is a distinct offence from

(a) 2 H. & N. 219. 247.

(b) 7 E. & B. 697.

the offence of which he was before convicted; and he is liable to be convicted for that, although he had not returned to the service in the meanwhile." *Coleridge, J.*, said, "I think the doctrine contended for most unreasonable." And *Erle, J.*, expressed himself to a similar effect. [*Pollock, C. B.*—The difference of the language of the statutes, when dealing with apprentices and servants, appears not to have been pointed out in the argument in the Court of Queen's Bench. *Wilde, B.*—The 6 Geo. 3, c. 25, was not referred to.] The legislature has always treated it as a matter of the utmost importance that servants should perform their contracts, because, from their inability to pay damages, there is practically no remedy against them by action for breach of contract. The object of the punishment is to compel performance of the contract; but if the contract is to be treated as determined by the imprisonment, the intention of the legislature will be defeated. The 20 Geo. 2, c. 19, s. 2, enabled the justices, on complaint made by any master against any servant, &c., concerning any misdemeanor, &c., to punish the offender by commitment, *or otherwise by abating* some part of his wages, *or by discharging him*. The 4 Geo. 4, c. 34, recites this Act, and does not repeal it; and in that statute also the power of discharging the servant is given as an alternative punishment. There is an Act relating to colliers, the 40 Geo. 3, c. 77, s. 3, by which on conviction the legislature expressly puts an end to the contract. Therefore, where the legislature intended that the contract should be determined by the conviction, it has expressly so provided. [*Pollock, C. B.*—I do not say that the contract was at an end by the conviction, but that there could not be a second commitment. The case of *Ex parte Baker (a)*, in the Court of Queen's Bench, is no authority that the

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magistrates can convict a second time under the 6 Geo. c. 25. *Martin, B.*—The clause relating to apprentice appears to contemplate the case of an apprentice absenting himself, returning to his master's service and afterwards again absenting himself.] There are several authorities which shew that the conviction of the servant for absenting himself does not put an end to the contract. In *Re Barton-upon-Irwell (a)*, where a servant under a year's hiring served two months, and was then committed to prison under the 20 Geo. 2, c. 19, for misbehaviour towards his master, and after nine days imprisonment was, upon application of the master discharged and returned to service with him as before, it was held that the commitment and imprisonment were not a dissolution of the contract, or such an interruption of the service as to prevent a settlement. Lord *Ellenborough, C. J.*, there said, "It would be clear against the policy of the law if the servant, by his own act of delinquency, should have the power of dissolving the contract. The justices have that power, but they have not exercised it." In *Rex v. Hallow (b)* it was held that a servant hired for a year who had been committed under the 20 Geo. 2, c. 19, must be considered as abiding in his master's service within the meaning of the 8 & 9 Wm. c. 30. *Bayley, J.* there said, "the contract not being dissolved, if the servant were released from prison before the end of the year the master would be under the necessity of receiving him." And *Holroyd, J.*, said: "the servant being imprisoned and punished as a servant, might have insisted on going back to his master, or the master might have compelled him to return, as soon as he was discharged out of custody." [*Pollock, C. B.*—The wages of the servant would be payable during the period of imprisonment were it not for the abatement. As to the suggestion that the defendant had

(a) 2 M. & Sel. 329.

(b) 2 B. & C. 739.

no guilty intention at the time when he absented himself; he did so wilfully in order to get higher wages; and when he came before the justices on the last occasion, the attorney took it upon himself to advise him that he might rely on the opinion of a single Judge whose opinion differed from that of the majority of the Court, and from that expressed by the Court of Queen's Bench. The case is one to which the maxim "*ignorantia juris neminem excusat*" applies. The case of *Rider v. Wood* (a), where the appellant intended to perform his contract, is distinguishable, for in that case the mens rea was absent. Lastly, as to the point whether the 6 Geo. 3, c. 25, s. 4, is repealed by the 4 Geo. 4, c. 34, s. 3, Baron *Watson*, in his judgment in *Re Baker* (b), points out that an affirmative statute does not repeal an earlier Act on the same subject, unless they are plainly inconsistent with each other. Now it is submitted that there is a large class of cases to which the 6 Geo. 3, c. 25, applies, but the 4 Geo. 4, c. 34, s. 3, does not; as, for instance, in the case of piece work, where there can be no abatement of wages. Again, an appeal is given by the 6 Geo. 3, c. 25, but it is taken away if that statute is repealed.—He also referred to *Willett*, app., *Boote*, resp. (c).

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Mellish replied.

POLLOCK, C. B.—I am of opinion that this adjudication and conviction cannot be sustained, because it appears to me that the defendant acted with perfect bona fides, and that his determination not to return to his employment arose out of an honest opinion that the contract was at an end. The case of *Rider v. Wood* (a) shews that, under such circumstances, the defendant

(a) 29 L. J., M. C. 1.

(b) 2 H. & N. 219.

(c) 6 H. & N. 26.

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ought not to have been convicted. My brother *Wilde*, who has left the Court, intimated that on this point he did not agree with me. Then, without discussing whether justices can interfere a second time on the refusal of a workman to return to his service when the first absence is merely of a temporary nature such as an attempt to take a holiday, I think that when the servant's conduct shews that he meant to quit the service altogether, the justices should treat it as an entire abandonment of the service, and punish him accordingly. Here the defendant's original departure from the service of his master was a departure with intent to leave it altogether and for ever. I think that the legislature intended that this should be dealt with as an entire and single offence. But, in addition to that, I find that this conviction took place under the 6 Geo. 3, c. 25, by which the justice is empowered to commit for a period *not less than* one month. In that respect, the statute 6 Geo. 3, c. 25, is repealed. For these reasons I am of opinion that the conviction cannot be supported.

MARTIN, B.—I also think that the conviction under the statute 6 Geo. 3, c. 25, is bad. If a statute deals with a particular class of offences, and a subsequent Act is passed which deals with precisely the same offences, and a different punishment is imposed by the later Act, I think that, in effect, the legislature has declared that the new Act shall be substituted for the earlier Act. That is the real and sensible meaning to be collected from the two Acts, if they are read and construed with reference to each other as any other written documents would be. I think, therefore, that justices must act on the 4 Geo. 4, c. 34, and cannot fall back on the 6 Geo. 3, c. 25. My brother *Wilde* intimated to me that he agreed with my lord and myself on this point.

As to the question whether the defendant could be convicted a second time, I adhere to the opinion I expressed in *Re Baker* (a). I think that if a workman leaves his service intending never to return to it, the master may sue him at law ; but, if so, he must treat the departure from the service as one entire breach, of which recovery in an action must be deemed a satisfaction whether the workman be rich or poor. Or, if he prefer it, the master may proceed under the statute, and then the offence is abandoning the service. That is an entire and single offence, which neither the master nor the servant can split into several offences ; and when once adjudicated upon there is an end of it. As to the point that the defendant relied on the advice of his attorney, I prefer not to express any opinion upon it. It is difficult to say that a person who breaks the law shall be excused because he bonâ fide believes that he has a right to do so.

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BRAMWELL, B.—I incline to think, that upon the point whether the 6 Geo. 3, c. 25, so far as it relates to this matter is abrogated, the appellant is right, though I am not prepared to give a final opinion that the earlier enactment is repealed. Still I do not think it must be assumed that the 4 Geo. 4, c. 34, would not apply to the case of a man working by piece work. I desire to express no definite opinion on the point. As to the question whether a workman who absents himself can be convicted a second time under this statute, I think that he may. It is true that, generally speaking, breaches of contract are left to be dealt with as civil injuries by the ordinary tribunals ; but the legislature has thought it necessary to make some exceptions, as in the case now under consideration, in the case of fraudulent bailees, and under the County Courts Acts,

(a) 2 H. & N. 219. 245. *Nota bene*, at p. 245, line two from the bottom, for "no" read "a."

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where parties are subjected to imprisonment by way of punishment. Indeed I do not see why, if a person wilfully breaks a contract with the dishonest purpose of bettering himself (though, no doubt, generally speaking, such an act would not be called a crime), he should not be punished for it. The proceeding by action against a workman would be nugatory. The legislature has given to the workman countervailing privileges, by enabling him to avail himself of a cheap remedy before magistrates for his wages. Therefore I do not think it unreasonable that the master should have a similar remedy to compel the performance of his agreement. The cases shew that the contract is not terminated by the imprisonment. Indeed, that is manifest from the third section of the 4 Geo. 4, c. 34, which empowers the magistrates to punish *or* discharge the workman. That statute, therefore, contemplates that they may punish and *not* discharge. The master may say to the workman, "You have chosen to go, and shall not come back to my service." But the first offence may have been drunkenness for a day, and if the workman is punished for such an offence, why should the master lose his remedy during the continuance of the contract? No doubt, it would be a hard case if a workman should be again brought up after having suffered punishment for quitting the service; but the answer is, that no discreet magistrate would impose more than a nominal punishment for such an offence. Then as, under the 3rd section of the 4 Geo. 4, c. 34, there is power to punish a workman a second time for a second misdemeanor, I think there was the same power under the 6 Geo. 3, c. 25, s. 4. But, entertaining that opinion as to the policy of the Act, I should be sorry if the law was not as laid down in the case of *Rider v. Wood (a)*, because if it were not it would be harsh and unrea-

(a) 29 L. J., M. C. 1.

sonable. It appears to me that the object of the statute was to punish persons for *wilful* breaches of contract. It would be a great hardship if, in cases where a workman quits his service, thinking he has a right to do so, the master should not be left to his common law remedy upon the contract. The Court of Queen's Bench held that the summary jurisdiction applies only in cases where the act is knowingly and wilfully done—where the workman knows he is doing wrong. That decision is entirely satisfactory to my mind, and the substance of it is that the statute is not intended to apply to cases where the workman is acting in the exercise of a supposed right, but to punish and repress avowed and wilful breaches of contract. There are cases where a man does a prohibited act as to which no question of intention arises, as, for instance, in the case mentioned in the argument of bigamy committed by an Englishman after a divorce obtained in Scotland. Here, however, the justices find that the defendant was advised that he was not bound to return to his service, and they think it probable he really believed what he was so advised, and under these circumstances they ought not to have convicted him. It is not material on what ground he believed he had a right to continue absent from his service—it may have been a very foolish one; but if the justices do not find that he absented himself knowing he was doing wrong, one of the ingredients essential to a conviction is wanting. I incline to think that the conviction is bad on the ground that the 6 Geo. 3, c. 25, s. 4, is no longer in force. But I dissent from the view of my learned brothers on the other point.

Determination of the Justices reversed.

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May 1.

JOHN WAKE, Executor of WILKINSON, v. THOMAS HALL
and J. C. HARROP.

To a declaration on a charter-party, alleging as a breach the refusal by the defendants to load a cargo, the defendants pleaded, as an equitable defence, that they entered into the charter-party solely as agents for A. D. and Co., and that, when the defendants signed the charter-party, it was agreed and understood between the plaintiff and the defendants that the defendants were only to sign the charter as such agents, so as to bind A. D. and Co., and were not to make themselves liable as principals for the performance of the charter: that they signed as follows:—"For A. D. and Co., of Messina. H. and agents:" the defendants and the plaintiff bona fide believing at the time the charter made, that the defendants having so signed would not be liable to be sued on the charter notwithstanding the charter in the body thereof professed to be made between the plaintiff as owner of the one part and the defendants as freighters on the other; that the defendant had the power to bind A. D. and Co., and that the plaintiff was inequitably taking advantage of the mistake in drawing the charter.—*Held*, that the plea shewed a good equitable answer to the action. And per *Bramwell, B.*—*Semble*, that it was a good answer at law.

DECLARATION by the plaintiff, as executor of T. Wilkinson, stating that T. Wilkinson and the defendants agreed by charter-party that T. Wilkinson's ship, the "Will Hutt," should proceed to one usual port in Sicily, as ordered at her outward port of discharge, say Venice, or as elsewhere thereto as she could get; and that the defendants should then load her with a complete cargo of sulphur in bulk, which she should carry to Newcastle-upon-Tyne, and then deliver the same on payment of freight, seventeen shillings per ton of twenty hundred weight delivered; that the defendants should be allowed thirty running days for loading the said ship abroad and discharging at Newcastle, and ten days for demurrage, if required, at five pounds per day; that the defendants duly ordered the ship at her outward port of discharge to proceed to Catania; that T. Wilkinson did all things necessary to entitle him to have the agreed cargo loaded on board the ship at Catania and the time so doing elapsed, yet the defendant made default in loading the agreed cargo, &c.

Plea, on equitable grounds.—That the defendants entered into the charter-party solely as agents for A. Davidson & Co. of Messina; and that, before the defendants signed

said charter, it was agreed and understood between and by T. Wilkinson and the defendants, that the defendants were only to sign the said charter as such agents as aforesaid, so as to bind the said A. Davidson and Co., and were not to make themselves liable as principals for the performance of the said charter; that they signed the charter-party in the following manner:—"For A. Davidson and Co., Messina, T. W. and J. C. Harrop and Co., agents;" they, the defendants, and T. Wilkinson bonâ fide believing at the time the said charter was signed, that the defendants having so signed the said charter would not be personally liable to be sued on the said charter as the charterers, notwithstanding the said charter in the body thereof professed to be made between T. Wilkinson as owner of the ship on the one part, and the defendants as merchants and freighters on the other part; that the defendants had power to bind the said A. Davidson and Co. by signing the charter as their agents; that A. Davidson and Co. are bound by the said charter, and are liable to be sued for the breaches of the said charter in the declaration mentioned; and that the plaintiff is inequitably taking advantage of their mistake in drawing the said charter, so as to make the defendants personally liable as charterers contrary to the intention both of T. Wilkinson and the defendants, to maintain this action against the defendants.

Demurrer and joinder.

Manisty (with whom was *Lewers*), in support of the demurrer.—By the terms of the charter-party declared on the defendants contracted personally. The effect of a contract similar in its terms to that now before the Court was considered by the Court of Queen's Bench in *Lennard v. Robinson* (a), where it was held that the defendants were

(a) 5 E. & B. 125.

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contracting parties, and that there was nothing in the nature to prevent them from being so. The plea is that the defendants did not contract except as a but if they wished to carry that intention into effect should have expressed it in the body of the instrument in *Deane v. Gregory* &c. [Walk. B., referred to *M. v. Keane*]. Martin B.—There is an ambiguity in form of the signature, and the defendant admits the contract was intended to have a particular sense. Though evidence is admissible to show that a person was principal in the purpose of charging him, it is not for the purpose of discharging one who appears as agent in the face of the contract: 2 Smith's Lead. p. 223, 4th ed. *Thompson v. Senior* &c., *Dick v. Humphrey*, *Stratford v. Stratford* &c. *Pym v. Campbell* &c. P. C. 3.—Assuming that such evidence could not be given if the fact were disputed, here it is not denied. Say in the course of a trial a written instrument is put in which it appears that the defendant is bound as principal, but the plaintiff admits that the defendant is only as agent and not as if he rendered himself liable, & the effect be given in the admission? Then the plea is and the defendant admits that before signing the instrument it was agreed that the defendants should sign as agents. If that statement be true, the defendant is not the principal intended. [Walk. B.—] should not the defendants avail themselves of it as an excuse without having recourse to it as a defence? The plaintiff is entitled to a verdict against the instrument, but on this agreement he cannot sue the parties because, showing that Carroll and I were joint

11. 22. 11. 2. 3. 4.

12. 1. 1. 1. 2.

13. 1. 1. 1. 2.

14. 1. 1. 1. 1. 1861.

15. 1. 1. 1. 1. 1861.

16. 1. 1. 1. 1. 1861.

and the defendants agents, the testator took an instrument which made the defendants responsible. [*Martin*, B.—That does not entitle the plaintiff to hold the defendants liable, as on a contract into which they never entered.] According to the principle of the cases of *Perez v. Oleaga* (a) and *Teede v. Johnson* (b) an equitable defence is not allowable in a Court of common law, unless the party pleading it is entitled to unconditional relief. [*Martin*, B.—Here we can afford complete relief.] The defendants are not entitled to relief without giving the plaintiff a remedy against Davidson and Co. There is no equity in relieving one party unless the other is put in the position in which it was agreed that he should stand. A decree that the defendants should go without day would not do complete and final justice between the parties. On that ground an equitable plea was held bad in *Wodehouse v. Farebrother* (c). The plea merely sets up a mistake in law, and it is laid down as a maxim of equity that though parties making a mistake of fact shall not be held bound by acts committed by them under such mistake, yet when they make a mistake in law they cannot afterwards be heard to say that the contract shall on that account be set aside: per Lord Abinger, *Marshall v. Collett* (d).

Mellish, in support of the plea.—The charter-party is drawn in a form which binds the defendants at law, but the plea affords a good equitable answer to the claim of the plaintiff. [*Bramwell*, B.—The case of *Lennard v. Robinson* (e) is distinguishable from the present. The plea did not state, as here, what was the real agreement between the parties. It is consistent with the matters alleged in the plea in that case, that the plaintiff may have said to the

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(a) 11 Exch. 506.

(b) 11 Exch. 840.

(c) 5 E. & B. 277.

(d) 1 Y. & C., C. C. 238.

(e) 5 E. & B. 125.

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defendants, "I want your engagement." There is no allegation of mistake; and the Court thought that the reasonable construction was that the defendants *were agents, but that they were to be liable.*] That case only shews that on the face of this charter-party the defendants would be liable at law. The testator brought a charter-party to the defendants and requested them to execute it, telling them that they should not be held responsible, and upon that footing the contract was made. It has been contended that a Court of equity will not give relief against a mistake in law. In Story's Equity Jurisprudence, s. 115, p. 133 6th ed., that matter is discussed, and it is pointed out that a Court of equity will not "grant relief where a security becomes ineffectual, not by fraud or accident, or because it is not what the parties intended it to be, but because conforming to that intention the parties in executing it innocently mistook the law. * * * Equity has no authority to make agreements for the parties or to substitute one for another. If there had been any mistake in the instrument itself, so that it did not contain what the parties had agreed upon that would have formed a very different case; for where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman either as to fact or law, does not fulfil that intention or violates it, equity will correct the mistake so as to produce a conformity of the instrument." When there is a mistake in an agreement, it is unnecessary to go to a Court of equity to reform it if the agreement has been wholly executed, and nothing remains to be done by either party: *Steele v. Haddock* (a), *Vorley v. Barrett* (b), *Wood v. Duvarris* (c) *Perez v. Oleaga* (d). [*Wilde, B.*—In the last mentioned case

(a) 10 Exch. 643. 645.
 (b) 1 C. B., N. S. 225.

(c) 11 Exch. 493.
 (d) 11 Exch. 506. 511.

if the agreement had been reformed the defendant would have continued liable.] In *Wodehouse v. Farebrother* (a), the Court held that the plea was not a good equitable defence, but they did not intimate that the decision might not have been otherwise if the defendant had brought the money actually due into Court. It must not be assumed that Davidson and Co. are not liable upon this charter-party. The principal may be liable as well as the agent on the same agreement. [*Wilde, B.*—Mr. *Manisty's* contention is, that the principal cannot be sued if, the other party at the time of contract, knowing the principal, elects to contract with the agent.] In the present case if there was an election it was to contract with the principal.

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Manisty, in reply, referred to *Minshull v. Oakes* (b); Story on Agency, s. 267, p. 345, 4th ed., and *Croome v. Lediard* (c):

POLLOCK, C. B.—We are all of opinion that the plea is good, either at law or in equity. I think that it is good in equity. It professes to state that at the time of the execution of the agreement the defendants said, “We do not mean to make ourselves liable;” and that was assented to by the testator. I do not doubt but that if this were made out satisfactorily, a Court of equity would hold the defendants entitled to a perpetual injunction on the ground that the testator expressly renounced his rights against them. Under these circumstances the plaintiff had no right to sue the defendants, and never ought to have sued them. I do not agree that we are bound to find out some one against whom an action may be maintained. My brother *Martin* suggests that if the testator allowed the charter party to be executed in such a form

(a) 5 E. & B. 277.

(b) 2 H. & N. 793.

(c) 2 Myl. & K. 251.

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that he could sue no one, it was his own fault. All we say is, that he was not entitled to sue the defendants.

MARTIN, B.—I am of the same opinion. Assuming that the defendants are responsible at law, equity would give them relief. The plaintiff seeks to make them responsible on a charter-party executed by them. Before the instrument was executed it was agreed by the testator and the defendants that the defendants should only sign as agents, so as to bind Davidson and Co., but not to make themselves liable. The charter-party was signed in the following form:—"For A. Davidson and Co., S. W. and J. C. Harrop and Co., agents." As I have already observed, this is ambiguous; and though in a Court of law the defendants may be bound, I dare say that a person not being a lawyer would not so understand it. The charter-party is not under seal. In the body it professes to bind the defendants. But they would probably think that their responsibility depended upon the way in which they signed. The plea states that the testator and the defendants executed the charter-party, believing that the defendants would not be liable, that the defendants had power to bind Davidson and Co., and that they were bound; and that the plaintiff is taking an improper and inequitable advantage of the mistake in drawing the charter-party. If that is true, the plaintiff is taking a fraudulent advantage of the mistake. On these grounds I think that the defendants are entitled to absolute and unconditional relief.

BRAMWELL, B.—I am also of opinion that the defendants are entitled to judgment. I was disposed to think the plea a good answer at law; but I entertain some doubt on that point because Mr. *Mellish* did not urge it. It should be borne in mind that a written contract,

not under seal, is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to shew whether or not the written document is the binding record of the contract. Suppose agreements were prepared for the sale of two horses, one for 50*l.*, and the other for 100*l.*, and the buyer of one horse, by mistake, signed the contract for the other. The preliminary question would be, “Is this writing the record of the contract?” Again, suppose a person intending to become witness to a contract signed his name in the wrong place, and appeared to be the principal, the mistake might be shewn. In *Pym v. Campbell* (a), the Court of Queen’s Bench held, that it was open to the defendant to shew that an instrument, purporting to be an agreement signed by the defendants, was not intended to operate as an agreement. Here it is admitted that the defendants never agreed with the plaintiff’s testator, but that Davidson, through their agency, did. They say, “This paper was signed as the record of an agreement between Davidson and Co. and the testator, and not of any agreement between ourselves and the testator. There never was any valid agreement between the testator and ourselves.” It might be that the defendants so conducted themselves that the testator was entitled to say that he looked to them. But that is not so here, if I am right in my appreciation of the facts. In the body of the document the defendants appear to be personally bound; then comes the signature, which, but for the previous part, would seem to shew that the defendants signed for Davidson and Co.; and, as between the plaintiff and the defendants, I am

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(a) 5 E. & B. 277.

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not sure that it might not be so read. The case of *Lennard v. Robinson* (a) is no authority that this plea does not afford a good defence at common law. There the plea alleged that the agreement was entered into by the defendants, by the authority and as agents for Schwedersky, and not otherwise. The plea said, in effect, that the plaintiff, knowing this, ought to have understood that the defendants were signing only as agents. The Court say that the plaintiffs may have known that the parties signing were agents, and yet intended that they should be bound. But the principle of that decision would not prevent the defendants from shewing that they never entered into any agreement at all—that all they did was to contract on behalf of others, and that if the agreement purports to record an agreement between themselves and Wilkinson it is a mistake, and Wilkinson knew it,—and that, in fact, it never was intended to be the record, or evidence of an agreement between Wilkinson and the defendant. I have already observed, that, at first sight, the agreement appears to bind the defendants; but there is, nevertheless, an ambiguity, as explaining which the plea may be good at common law. But if so, it is clearly good in equity. The plaintiff puts forward an agreement purporting to bind the defendant; the defendant says:—"It was so drawn up by mistake, and you are inequitably availing yourself of the mistake." Mr. *Manisty*, for the plaintiff, said, "I am entitled to some agreement. Cancel this, and give me one binding other people." But I think that the plaintiff cannot make this a condition of abandoning the agreement, which he ought never to have attempted to enforce.

WILDE, B.—I am of opinion that there must be judgment for the defendants. I think that at law the contract bound the defendants. I cannot distinguish it from that in *Len-*

(a) 5 E. & B. 125.

nard v. Robinson (a). On the face of the agreement the defendants appear as principals. Then comes the question whether the plea on equitable grounds shews any defence. I think it does. Though the contract is so worded that in a Court of law it must be considered as binding the defendants, it was a mistake so to word it. It was understood by both parties that the principals only should be liable. The plea is that they thought that such was the effect of the contract: and I think it shews ground for relief in equity. The passages cited from Story's Equity Jurisprudence satisfy me that the defendants are right on this point. Mr. *Manisty* argued that, if so, it does not follow that they can plead this matter as an equitable defence. He says, with good reason, that Courts of law will not allow as an equitable defence any matter which does not put an end to the right of the plaintiff to sue the defendant. Thus, if the plea sets up a contract on which the defendant would be in some way liable, it is insufficient. But such is not the case here. If the mistake is corrected it would lead to the exoneration of the defendants. Then, he says, it would leave the plaintiff wholly without remedy against any one. For my own part, I am inclined to think that, on the contract as it stands, he has a remedy against Davidson and Co., but it is not necessary to decide that point, because, though the plaintiff may have no remedy against Davidson and Co. without getting the agreement reformed, the plea puts an end to all claims against the defendants whether there is a remedy against Davidson and Co. or not. I doubt whether, in applying the doctrine of equitable defences, we may not be giving them a wider operation than they have in Courts of equity. We constantly find Courts of equity saying they will interfere if ground for relief is shewn on satisfactory evidence. That is a principle on which a Court of equity is competent to act. But Courts of

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common law must allow or disallow pleas without reference to the extent of proof by which they may be supported. However, I do not think myself justified in acting on a principle different from that hitherto adopted. I merely throw out the suggestion, and possibly some modification of the present practice may be introduced. Perhaps, according to the opinion expressed in *Luce v. Izod* (a), it would be more satisfactory that the issue on such a plea should be tried not by a jury but by the Judge.

MARTIN, B.—It strikes me that terms such as those mentioned in the case cited might reasonably be imposed as a condition of allowing the plea.

Judgment for the defendants.

(a) 1 H. & N. 245, 246.

April 20.

ATKINSON v. DENBY.

The plaintiff, being in embarrassed circumstances, offered his creditors a composition of 5s. in the pound. The defendant, a creditor, refused to accept it unless the plaintiff paid him 50s., and gave him a bill of exchange for 108s. The other creditors would not

ACTION for money had and received. Plea—Never indebted.

At the trial, before *Martin*, B., at the Middlesex sittings, in Michaelmas Term, 1860, it appeared that the action was brought to recover 50s., paid by the plaintiff to the defendant under the following circumstances.—In October, 1857, the plaintiff, a manufacturer, being in embarrassed circumstances, offered a composition to his creditors of 5s. in the pound, and a deed of composition was prepared for the purpose of carrying out the offer. The defendant, a creditor for 319s., refused to accept the composition if the defendant did not. The plaintiff paid the defendant the 50s. and gave him the bill of exchange, and the defendant then executed the composition deed. *Held*, that the plaintiff might recover back the money in an action for money had and received. Per *Pollock*, C. B., *Bramwell*, B., and *Wilde*, B. *Martin*, B., dissentiente.

accept that offer or to sign the deed of composition, saying he never would consent to do so unless he got something more. On the 13th of October the defendant and the plaintiff met at the office of the plaintiff's attorney, when the plaintiff and defendant went into a private room. The defendant pressed the plaintiff to give him 150*l.* in cash in addition to the 5*s.* in the pound, but eventually he agreed to take a bill at six months for 108*l.* and 50*l.* in cash. The defendant knew that several creditors were then waiting to see what he would do. The plaintiff gave the defendant 50*l.* and a bill for 108*l.* The defendant then signed the deed. Five creditors had previously executed it, and twenty signed subsequently to the signature of the defendant. The composition was paid.

The deed was as follows:—"To all to whom these presents shall come: We, who have hereunto set our hands and seals, being respectively creditors of J. Atkinson, of &c., send greeting. Whereas, the said J. Atkinson is indebted to us, his said creditors, in divers sums of money, which he is not able fully to satisfy and discharge; and the said J. Atkinson hath proposed to us to pay us respectively the sum of 5*s.* in the pound upon, and in full satisfaction and discharge of, our respective debts: And whereas, we, the creditors of the said J. Atkinson, who have hereunto set our hands and seals, being satisfied of his inability to pay and discharge his said debts in full, have agreed, and do hereby respectively agree, to accept the said sum of 5*s.* in the pound upon our respective debts, in full payment satisfaction and discharge of all debts, dues and demand owing to us respectively up to the day of the date hereof: Now, therefore, Know ye that, in consideration of the sum of 5*s.* in the pound on our respective debts to us severally paid by the said J. Atkinson on the execution hereof by us respectively,

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the receipt whereof is hereby respectively acknowledged and for divers other good causes and considerations thereunto respectively moving, we, the said several who have hereto set our hands and seals, have and every of us hath remised, released and for ever charged, and by these presents do and every of us do our and each of our heirs, &c., fully and absolutely release and for ever discharge the said J. Arkin heirs, &c., from and against all debts, claims, suits, respect of our said debts, or any cause, matter, or thing therein. In witness, &c.

Upon these facts the defendant's counsel submitted there was no evidence to go to the jury, and, the Judge being of that opinion, the plaintiff was no longer being reserved to him to move to enter a verdict.

Ordered, in the same term, judgment a verdict for the plaintiff on the ground that the money was paid under duress.

Hudson and Thayer showed cause January 1, April 21. — The case falls within the rule that a plaintiff who has paid money under duress may recover it back. The rule that money is recoverable if it is paid under duress may be recovered back. It applies to this case. It applies to those cases where there is some duty or right on the part of the plaintiff to pay the money which is paid under duress. Such, for instance, as where a collector has exacted more than he was entitled to, or where a person is compelled to pay a sum of money which he is not entitled to. However, the defendant was under no obligation to show that the plaintiff was under duress. It was a matter of fact to be proved with him whether he

do so or not. The composition deed was not a proceeding in bankruptcy, but a mere voluntary agreement between the parties. The defendant, in refusing to enter into this agreement except on his own terms, was, therefore, not oppressing the plaintiff. On that ground *Smith v. Bromley* (a) is distinguishable. [Martin, B.—There it may be said that it was the duty of the creditors to sign the certificate, if a proper case, and that the consent ought not to have been bought. Wilde, B.—That was not such a duty as could have been enforced at law or in equity. Pollock, C. B.—If the deed is void, the defendant may keep the money. It is better to treat the contract to pay the 50l. as void, and the money as paid without consideration.] Money paid voluntarily in the nature of a gift cannot be recovered back. [Pollock, C. B.—It is not a voluntary gift. Martin, B., referred to *Wilson v. Ray* (b). Wilde, B.—That case seems to amount to no more than that the plaintiff, who had a legal defence of which he might have availed himself, did not do so. The principle of the cases relied on by the plaintiff is, that the party paying is under pressure: in *Wilson v. Ray* (b) the pressure was over at the time the money was paid.] In *Smith v. Cuff* (c) the money was not paid voluntarily. [Martin, B.—In *Higgins v. Pitt* (d) the Court, referring to *Cockshott v. Bennett* (e), point out that the agreement could not be enforced while in fieri.] In *Viner v. Hawkins* (f) an insolvent debtor who was remanded under the 85th section of the 1 & 2 Vict. c. 110, having been arrested by the creditor at whose suit he was remanded, in order to obtain his discharge signed a consent to a Judge's order for payment of a certain sum down, and the remainder of the debt by instalments. He

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(a) 2 Doug. 695, n.
 (b) 10 A. & E. 82.
 (c) 6 M. & Sel. 160.

(d) 4 Exch. 312. 323.
 (e) 2 T. R. 763.
 (f) 9 Exch. 266.

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paid that sum at the time he signed the consent, and discharged; and it was held that, though the security invalid, he could not recover back the money paid, as it was paid voluntarily. In the present case the money was not paid under duress, as it might have been contended was the case in *Viner v. Hawkins* (a). The true criterion of coercion is to be found in a dictum of Lord Kenyon in *Fulham v. Down* (b), and adopted in *Valpy v. Manley* (c) by Tindal, C. J., who said: "Without going through the authorities, it is enough to say that this case falls within the exception in the dictum of Lord Kenyon in *Fulham v. Down*, that 'where a voluntary payment is made of an illegal demand, the party knowing the demand to be illegal, *without an immediate or urgent necessity* (or, unless to redeem or preserve your person or goods), it is not the subject of an action for money had and received'—a form of expression which clearly assumes that there be an immediate and urgent necessity, or the payment is made for the purpose of redeeming or preserving one's person or goods, the right to bring this sort of action exists. Nor am I able to distinguish this case from *Snowdon v. Davis* (d). I am not aware that there is any difficulty or impropriety in laying it down that where money is voluntarily paid, with full knowledge of all the circumstances, and the party intending to give up his right, he cannot afterwards bring an action for money had and received; but that if otherwise where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconveniences of having his goods sold." [Pollock, C. B.—Is there any difference in principle between the case of a debtor giving a 50*l.* Bank of England note, and

(a) 9 Exch. 266.

(b) 6 Esp. 26, n.

(c) 1 C. B. 594. 602.

(d) 1 Taunt. 359.

promissory note for 50*l.* not payable on demand? The tendency of modern legislation is to abolish all distinctions not founded on good sense.] The principle of the decisions that money paid under coercion may be recovered back, is that there was "an unlawful act on the part of the defendant and a necessity on the part of the plaintiff:" per *Coleridge, J.*, in *Glynn v. Thomas* (a). The taking advantage of a man's situation does not, in every case, amount to coercion. *Smith v. Bromley* (b) is distinguishable from this case, for there the money was paid for signing a certificate, to which the bankrupt was entitled and which the creditor wrongfully refused to sign unless paid for it. That was, therefore, a case of oppression and the parties were not in *pari delicto*. [*Martin, B.*—If the plaintiff had given the defendant fifty sovereigns, according to the argument on the other side no property would have passed, and trover might have been maintained for them.] The principle of the decision in *Wilson v. Ray* (c) was adopted by *Tindal, C. J.*, in *Gibson v. Bruce* (d). The result of the authorities on this subject is thus stated in 2 *Wms. Saund.*, p. 137 k, note:—"Where a note so given has been negotiated by the creditor, and the holder has enforced payment from the insolvent, the latter may recover back the amount from the creditor, though, if he chooses to pay the note *to the creditor himself*, whether voluntarily or under compulsion of legal process, he cannot recover back the amount so paid." Moreover, the action for money had and received will not lie where the parties cannot be placed in *statu quo*.—They also referred to *Bradshaw v. Bradshaw* (e), *Parker v. The Great Western Railway Company* (f), and *Mallalieu v. Hodgson* (g).

(a) 11 Exch. 870. 879.

(b) 2 Doug. 695, n.

(c) 10 A. & E. 82.

(d) 3 Man. & G. 299.

(e) 9 M. & W. 29.

(f) 7 Man. & G. 253.

(g) 16 Q. B. 689. 712.

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Overend and Cleasby, in support of the rule.— present case falls within the principle stated by Lord *Ellenborough* in *Smith v. Cuff* (a), that “where money has been obtained extorsively and by oppression, and in fraud of party’s own act as it regards the other creditors,” an action lies to recover it back. That is in conformity with the doctrine laid down in *Smith v. Bromley* (b), where the action was brought to recover 40*l.*, which had been paid to induce a creditor to sign the certificate of a bankrupt. Lord *Manly* said “it was iniquitous and illegal in the defendant to take and therefore it was so to detain, this 40*l.* If a man makes use of what is in his own power to extort money from a person in distress, it is certainly illegal and oppressive; and whether it was the bankrupt or his sister who paid the money is the same thing. The taking money for signing certificate is either an oppression on the bankrupt or his family, or a fraud on his other creditors. It is a thing wrong in itself before any provision was made for it by statute.” And again—“the act is in itself immoral or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff’s condition and situation, then the plaintiff shall recover.” [*Pollock*, C.] —In *Smith v. Cuff* (a) Lord *Ellenborough* said, “this is not a case of *par delictum*; it is oppression on the one side and submission on the other: it never can be predicated of *par delictum* where one holds the rod and the other bows to it.”] *Williams v. Hedley* (c), and *Horton v. Riley* (d)

(a) 6 M. & Sel. 160. 165.

(b) 2 Doug. 695. 697, n.

(c) 8 East, 378.

(d) 11 M. & W. 492.

were decided upon a similar principle. In *Higgins v. Pitt* (a), Parke, B., in delivering the judgment of the Court, suggested a doubt whether a debtor paying money down as the price of procuring a fraud on his other creditors, before the creditors enter into the composition, has a right to recover it back. [Pollock, C. B.—No doubt there would be a difficulty if the matter were *res integra*. But what would be the consequences? Either the fraud of the debtor would vitiate the whole deed, or we must say that, though the transaction is wrong on the part of the debtor, it is so far more wrong on the part of the creditor that the transaction between them must be deemed void, and the deed good. If the deed is to stand, I do not see how the defendant can be allowed to keep this money. *Wilde*, B.—The case appears to fall directly within the principle established in *Smith v. Bromley* (b).] On the face of the deed the defendant released the whole of his debt. [Martin, B.—The plaintiff in this action is not the person who was defrauded.]

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POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to recover back this money, and the ground upon which I entertain that opinion is extremely short. It appears to me that if the plaintiff had given the defendant a bill of exchange for the 50*l.* the latter could not have enforced payment of that bill; and if it had been paid by the plaintiff, he would have been entitled to recover back the money from the defendant. Here, however, instead of giving a bill, the plaintiff has paid the defendant 50*l.*; and the question is whether the plaintiff is entitled to recover back that money. The course of modern decisions has been to give no effect to a difference between two states of circumstances which is apparent only, not real; and it seems to

(a) 4 Exch. 312. 325.

(b) 2 Doug. 695, n.

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me that the plaintiff, having paid the money, may be considered in the same position as if he had given a bill and afterwards refused to pay it; or, not having given a bill had promised to pay the money; in either case he would be free from any obligation to pay, because there would be no legal mode of enforcing the promise. It appears to me that this case is similar, not to that of an insolvent who voluntarily pays a particular creditor, but to that of an insolvent who pays under oppression and coercion. If, in the case which we have put, the creditor could not recover on the bill, what difference does it make if, instead of taking a security, he writes to say, "I will not execute the composition deed unless you pay my debt in full"? He has no right, with the knowledge that he is deceiving the body of creditors, who consent to accept a smaller sum under a notion that he is accepting no more, to be paid the full amount of his debt. It is a gross fraud on the other creditors, and if we were to hold that the money could not be recovered back, the consequence would be that creditors would refuse to enter into arrangements each suspecting that the other was endeavouring to obtain an unfair advantage. A creditor has no right to say, "I will pretend to take nothing but my composition, but will insist on being paid in full." There is another consideration which weighs with me, viz., that if this money cannot be recovered back, one of the creditors will have received an advantage in fraud of the others, and the whole transaction, from beginning to end is void, and the deed of composition a nullity. It is clear that the defendant intended that the plaintiff's debts should be released, and that the other creditors should believe that the defendant had accepted the composition in discharge of his debt. We are bound to give effect to the law, and the only way in which the insolvent can be relieved is by our holding that this money can be recovered back; for, if the composition deed is void, he might be instantly sued

by the whole body of creditors. In my opinion we shall more soundly administer the law and lay down a rule having the effect of promoting the prosperity of trade and relieving those who suffer from misfortune, by deciding that this money may be recovered back, and, moreover, in doing so, we are giving effect to that which the defendant intended, viz., that the plaintiff should be relieved from his debts. On these grounds I think that the rule ought to be absolute.

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MARTIN, B.—I am of opinion, as I was at the trial, that this money cannot be recovered back. Except that the case is likely to go to a Court of error, I should not have considered it necessary to state at length my view of the law. This was, in my judgment, a voluntary payment by the plaintiff, with full knowledge of the facts, the money being justly due to the defendant. Now, the law is clear that an illegal contract cannot be enforced, and, as a general rule, money paid under an illegal contract cannot be recovered back: *quod fieri non debet factum valet*. This was an illegal contract, and had it remained unexecuted the creditor could have maintained no action against the debtor in respect of it. But the money has been paid under this illegal contract, and therefore it cannot be recovered back unless this case is an exception to the general rule. It is argued that the money can be recovered back for this reason, that, as between the plaintiff and defendant, the defendant is the greater delinquent. But the plaintiff owed it to his creditors to deal honestly by them, and it seems to me that this transaction can only be an exception to the general rule by reason of its operation on the other creditors. But who was the greater delinquent towards those creditors? It was the plaintiff himself; because he has committed a breach of faith towards those persons to whom he was bound to act honestly. As to oppression, I do not

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see why a creditor may not get 20s. in the pound for a debt justly due to him. There is, in my opinion, nothing contrary to law or morality in his so doing; and I think we should, so far as we can, strictly carry out the contracts people make for themselves, when they are not contrary to law or morality. When this money was paid it was never intended by the parties that it should be had back. However, my judgment proceeds on the principle that this was an illegal contract, and that money paid under an illegal contract cannot be recovered back. In the case of *Smith v. Cuff* (a), where the debtor was allowed to recover back the money, payment of the promissory note had been enforced against him; he had no defence, and was obliged to pay it. That is quite a different matter from a voluntary payment. For these reasons, I think that the rule ought to be discharged.

BRAMWELL, B.—I am of opinion that the rule ought to be absolute. Nothing can be more dishonest on the part of a creditor than to pretend to take a composition of 5s. in the pound, and then agree privately with the debtor for payment of a larger sum and so get more than the other creditors. It may be that I am influenced by that consideration; but if it were not for the opinion entertained by my brother *Martin*, I should have thought the law plain. I agree that if a man voluntarily pays money which he was not bound to pay, as a general rule he cannot recover it back. So, if a man voluntarily pays a bill of exchange which he was not bound to pay, he cannot say "I ought not to have done so, and I will now recover back the amount." I admit also, that if a man, upon a corrupt bargain, pays money or gives a bill of exchange, he cannot recover it back. But upon this general rule there has been engrafted

(a) 6 Mau. & Sel. 160.

what has been called judge-made law, but which I think is most salutary law. The qualification is this, that where, though the act is voluntary in one sense, the person for whom it is done has a species of power over the other so that the latter does the act under coercion, there, though the contract is unlawful, it is not a case of *par delictum*, because it is a case of oppressor and oppressed. That is the qualification of the general rule, and in such cases, though the payment of money is in a certain sense voluntary, it may be recovered back. If that is not true, *Smith v. Bromley* (a) and *Smith v. Cuff* (b) were wrongly decided, because there the act was in one sense voluntary and the agreement illegal. But those cases having been so decided, I think we are bound by them. Then, as a general rule, a voluntary act cannot be undone, an unlawful agreement cannot be enforced; but the cases to which I have referred have established the qualification I have mentioned. Here, though in one sense the payment was voluntary and the agreement illegal, it was a payment under coercion, and the parties were not in *pari delicto* because there was an oppressor and an oppressed. At one time I doubted whether the payment ought not to be considered voluntary, not in the sense that the plaintiff was not bound to make it, but that at the time he paid the money he did not get the benefit of his bargain. The evidence, however, shews that the whole transaction was *uno flatu*, and whether the advantage to be got by the payment occurred at the time it was made or a week afterwards seems to me to make no difference. If, indeed, the plaintiff had voluntarily paid the money, after the composition was entered into, the case would not have been within the qualification I have mentioned, and *Wilson v. Ray* (c) is an authority that the money could not have been recovered back. With great

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(a) 2 Doug. 695, n.

(b) 6 M. & Sel. 160.

(c) 10 A. & E. 82.

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deference to Lord *Wensleydale*, and the doubt he expressed in *Higgins v. Pitt* (a), as to the soundness of the dictum of Lord *Ellenborough* and *Bayley, J.*, in *Smith v. Cuff* think that case was rightly decided. In my opinion cannot alter the principle whether a bill is given which the debtor is obliged to pay to a bonâ fide holder, after the election by the creditor of the composition deed, or whether the money is previously paid by the debtor to the creditor. It makes no difference that in the one case the foundation of the action would be for money paid, in the other for money had and received. At first I doubted whether this was a voluntary payment, but I should be reluctant to hold that the debtor is bound to say, after the creditor has executed the deed of composition, "I will not give you what you ask:" it would introduce dishonesty. I would rather say the debtor should perform his bargain then and recover back the money. *Smith v. Bromley* (c) is an authority that this was not a voluntary payment in the sense that the plaintiff had not have been paid the money. It was a payment for the purpose of obtaining an advantage which the defendant withheld, and which he extortionately granted. If this view is wrong no action could have been maintained in *Smith v. Bromley* (c) and *Smith v. Cuff* (b).

WILDE, B.—I also think that the plaintiff is entitled to recover back the 50*l.* paid by him to the defendant. It would be a great misfortune if any nice distinction broke through an established principle which, whether it is called common law or judge-made law, is the law until overruled, and there are only two ways by which that can properly be done, either by a Court of error or an act of the legislature. So long as the law remains the law we are bound to act upon it, for we do

(a) 4 Exch. 325.

(b) 6 M. & Sel. 160.

(c) 2 Doug. 695, n.

sit here as a Court of appeal. Then, has this question been decided? I think it has. In *Smith v. Cuff* (a), the bargain was that if the creditor would execute a composition deed with the other creditors to receive 10s. in the pound, the debtor would give him two promissory notes for the remainder of his debt. The deed was executed and the notes given, and one of them got into the hands of a third person who enforced payment from the debtor, and then, notwithstanding the illegality of the original contract, the debtor recovered the amount from the creditor. That is the substance of the case, and it only differs from the present in this, that here, instead of a promissory note being given, and indorsed to a third person, the money was paid at the time of the illegal contract. In my opinion it is the same thing whether the debtor gives his creditor 50*l.* in money or puts into his hands a piece of paper by which payment of 50*l.* may be enforced against him. *Smith v. Cuff* (a) was decided on the authority of *Smith v. Bromley* (b), where Lord *Mansfield* said, that "the taking money for signing certificates is either an oppression on the bankrupt or his family, or a fraud on his other creditors." Also, in *Browning v. Morris* (c), Lord *Mansfield*, after observing that, where the contract is executed and the money paid, if the parties are in *pari delicto*, it cannot be recovered back, said:—"For instance, in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action; because both plaintiff and defendant are *equally criminal*. But where the contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one from their situation and condition being liable to be oppressed or imposed upon by the other; *there* the parties are *not in pari delicto*, and in furtherance of these statutes

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(a) 6 M. & Sel. 160.

(b) 2 Doug. 695, n.

(c) 2 Cowp. 790. 792.

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the person injured, after the transaction is finished and completed, may bring his action and defeat the contract." Here the plaintiff says to the defendant, "Pay me back the money which you received from me under an illegal contract." The defendant says, "It is true that the contract was illegal, but we were in *pari delicto*, you paid the money with full knowledge of all the circumstances." The plaintiff replies, "We were not in *pari delicto*, for I paid you the money under coercion." That is the principle on which *Smith v. Cuff* (a), *Smith v. Bromley* (b), *Browning v. Morris* (c), *Williams v. Hedley* (d), and that class of cases, proceeds. The application of the maxim, *quod fieri non debet factum valet*, depends on whether the parties are in *pari delicto*, and notwithstanding the dictum of *Parke, B.*, in *Higgins v. Pitt* (e), it seems to me that this case falls within the principle, and that the parties are not in *pari delicto*, for one was under coercion. Courts of justice should endeavour to throw every impediment in the way of carrying out a contract to pay money in order to induce one creditor to execute a deed which is a fraud on the other creditors; and the most effectual mode of preventing it is to hold that the money may be recovered back. Therefore, on the ground of public policy, on principle, and on authority, if we find that money has been paid under a fraudulent contract, and the parties are not in *pari delicto*, we ought to hold that it may be recovered back.

Rule absolute.

(a) 6 M. & Sel. 160.

(b) 2 Doug. 695.

(c) 2 Cowp. 790.

(d) 8 East, 378.

(e) 4 Exch. 312. 325.

1861.

In the matter of a plaint, in the County Court of STAFFORDSHIRE, holden at WOLVERHAMPTON, between FOSTER and GREEN.

May 8.

GRAY had obtained a rule calling upon the judge of the County Court of Wolverhampton to state a case for the opinion of this Court.

It appeared that the action was brought to recover 40*l.* for monies lent by the plaintiff, a banker, to the defendant. The case was tried by the judge of the County Court and a jury on the 29th of October, 1860. One Cross, the manager of the plaintiff's bank, proved that he paid the defendant 40*l.*, and obtained his signature to a check for that amount.

The defendant's case was, that he was in the employment of Cross, who carried on ironworks; that he was in the habit of calling on Cross at the bank for money due to him on account of the works, and that on the occasion in question he went to ask for money which was due to him, when Cross gave him the 40*l.*, and he signed a receipt, but never signed any check. The jury found a special verdict, as follows—"That Green received the 40*l.* from Cross, believing it to be payment to him on account of a large sum of money owing from Cross to Green, and that he signed the check believing it to be a receipt for the 40*l.*" The judge thereupon directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him, or for a new trial. On the same day the plaintiff's attorney asked for leave to move for a new trial. The motion was made on the 21st of November, on the grounds that the finding of the jury did not warrant

On the trial of a cause before the judge of a County Court and a jury, the jury found a special verdict, on which the County Court judge entered the verdict for the defendant, giving leave to the plaintiff to move to enter a verdict or for a new trial. The application was subsequently made and refused.—*Held*, that, under the 13 & 14 Vict. c. 61, s. 14, the plaintiff had a right of appeal from the decision of the judge in refusing to enter a verdict or for a new trial.

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the entry of a verdict for the defendant; and that the verdict was against evidence; also on the grounds of misdirection, and surprise. The hearing of the motion was adjourned from time to time till the 1st of March, 1861, when the judge gave judgment, refusing either to enter a verdict for the plaintiff or to grant a new trial, but without costs. Within ten days after the 21st of March, the plaintiff's attorney gave notice to the defendant of his intention to appeal against the determination of the judge in point of law on the motion made on his behalf on the 21st of March. The case was prepared by the plaintiff's attorney, and transmitted by him to the defendant's attorney, who refused to settle or approve of it. On the Court on the 8th of April, being the next after that held on the 21st of March, the case was presented to the County Court judge, who refused to settle or sign it, on the ground that the judgment of the Court in refusing to enter a verdict for the plaintiff or for a new trial, was not a determination or direction in point of law within the 13 & 14 Vict. c. 61, s. 14.

J. E. Davis now shewed cause.—The plaintiff's notice of appeal was too late. In a trial before the judge of County Court and a jury the verdict is the judgment. [*Bramwell, B.*—The plaintiff does not appeal against the verdict, but against the decision on the motion for a new trial.] There is no power to appeal from the decision of the judge on the motion for a new trial. The parties cannot appeal except from a judgment, and the only judgment was the verdict. The language of the 14th section of the 13 & 14 Vict. c. 61, shews this: the appellant is to give security "for the amount of the judgment if he be the defendant, and the appeal be dismissed. Provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required

in any case where the judge of the County Court shall have ordered the party appealing to pay the amount of *such judgment* into the hands of the clerk of the County Court." This section was considered by *Patteson*, J., and *Erle*, J., in *Rackham v. Blowers* (a), where it was held that no appeal was given against an order of committal, under the 99th section of the 9 & 10 Vict. c. 95, *Patteson*, J., saying that the appeal given by the statute applied only to judgments. [*Wilde*, B.—The County Court judge reserved leave to the plaintiff to move to enter a verdict, which was in effect saying he would not decide the question until there had been a further argument upon it. *Pollock*, C. B.—It is as if the judge had said, "The jury have found a verdict, but it is doubtful what is the effect of their verdict; I reserve my opinion upon the question of law, and, therefore, to comply with the usual form, I give the plaintiff leave to move to enter a verdict."]—Secondly, the plaintiff having elected to move for a new trial and failed, cannot now appeal to this Court.

Gray, who appeared in support of the rule, was not called upon.

MARTIN, B.—We are all of opinion that the rule must be absolute. It seems to me that there was no final determination or direction in point of law by the judge until he pronounced judgment on the motion to enter a verdict, or for a new trial. The plaintiff had a right of appeal from the judgment then given, and consequently the case was prepared and tendered by him in time.

BRAMWELL, B., and *WILDE*, B., concurred.

Rule absolute.

(a) 15 Jur. 758.

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GEORGE SHIEL, Appellant, THE MAYOR, ALDERMEN AND
BURGESSES OF SUNDERLAND, acting by the Council
of the Borough as the Local Board of Health, Re-
spondents.

April 22.

SAME v. SAME.

A bye-law made by a Local Board of Health, pursuant to the 21 & 22 Vict. c. 98, s. 34, directed that "every building to be erected and used as a dwelling-house, shall have an open space exclusively belonging thereto

THESE were two cases stated by justices of the borough of Sunderland under the 20 & 21 Vict. c. 43, the material parts of which were, in substance, as follows:—

By "The Borough of Sunderland Act, 1851," the Public Health Act, 1848, except certain parts therein mentioned, was incorporated with that Act. The Local Government Act, 1858, 21 & 22 Vict. c. 98, embraces within its provisions the borough of Sunderland; and, under the authority of the 34th section of that Act, the Local Board of Health

to the extent at least of one-third of the entire area of the ground on which the said dwelling-house shall stand and which shall belong thereto, &c." By the 21 & 22 Vict. c. 98, s. 34, no bye-law shall affect any building erected before the date of the constitution of the district, but the re-erecting of any building pulled down to or below the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building.

The proprietor of a house, which had been erected before the constitution of the district, and was used for an hotel, having a yard with coach-house and stables in the rear, for the purpose of making an addition to the hotel, pulled down the coach-house and stables below the ground floor, and erected upon the same site a building three stories high; the only means of access to the upper chambers being by going up the staircase of the old house and through a passage into the new building. On an information against the proprietor for an offence against the bye-law in not leaving an open space equal to one-third of the area of the ground on which the dwelling-house &c. stood, the justices found that the building erected in the yard being a new building built up to and adjoining the old building must either be considered with the old building as one house, or that the old house and new building must be considered as two erections, and that both old and new buildings must be considered in reckoning the ground upon which the building stood; and convicted him of a breach of the bye-law.—*Held*, that the conviction could not be sustained, because the new erection was not a new dwelling-house but merely an addition to an old dwelling-house: Or, per *Bramwell*, B., because the justices had not found that it was a new dwelling-house, which was essential to the validity of the conviction.

By the 21 & 22 Vict. c. 98, s. 34, local Boards are empowered to make bye-laws "with respect to the level, width and construction of new streets," &c. A local Board made bye-laws with a general heading, following the language of the 34th section. The first bye-law was also headed, "Width and level of new streets." It provided for the width of new streets, dividing them into front streets, cross streets and back streets; and went on, in a subsequent paragraph, to provide "that no dwelling-house shall be built immediately adjoining any back street without the special permission of the local Board."—*Held*, that this provision applied only to new back streets, and not to a new building in an old back street.

made certain bye-laws, which were duly certified by the Secretary of State (a).

(a) The bye-laws, the heading of which follows the language of the 21 & 22 Vict. c. 98, s. 34, are as follows:—

Bye-Laws.

With respect to level, width and construction of new streets and the provisions for the sewerage thereof, with respect to the structure of walls of new buildings, for securing stability and the prevention of fires; with respect to the sufficiency of the space about buildings, to secure a free circulation of air; with respect to the ventilation of buildings and with respect to drainage of buildings; to water closets, ash pits, cesspools, in connection with buildings; and to the closing of buildings or parts of buildings unfit for human habitation; and to the prohibition of their use for such habitation, made by the Local Board of the borough of Sunderland, in the county of Durham.

1. Width and level of new streets.

The minimum width of new streets shall be as follows:—For front or cross streets, the houses of which on both sides are to be only one story in height, thirty feet; for front or cross streets, the houses of which, on either one or both sides, are to be two stories in height, forty feet; for front or cross streets, the houses of which, on either one or both sides, are to be three or more stories in height, fifty feet; for

all back streets eighteen feet; and that the stories alluded to by these bye-laws shall be exclusive of attics, &c.

It is intended that a front street shall mean a street with which the front doors of the houses communicate; a cross street shall mean a street, intersecting other streets, to break the continuity of buildings therein, and a back street shall mean a street with which the back doors leading from yards of houses communicate; but no such front street or cross street shall be construed to be a back street on account of any such back door communicating therewith.

No dwelling-house shall be built immediately adjoining any back street without the special permission of the local Board.

Every new street shall be formed at such level as the local Board shall in each case determine.

All new streets that are eighteen feet wide and do not exceed nineteen feet wide shall have a foot-path on each side of not less than two and a half feet wide, &c.

Every new street shall have an entrance at each end of the full width thereof and open from the ground upwards.

11. "Every building to be erected and used as a dwelling-house shall have in the rear or at the side thereof an open space exclusively belonging thereto, to the extent at least of one-third of the entire area of the ground on which the said dwelling-house

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In the first case it was proved that the appellant was proprietor of a house recently converted into an hotel Fawcett Street, in the borough of Sunderland, and that, the back or east of the yard of the hotel, there is a back street. Both the front and back streets were streets which were made and formed several years before the passing of the Borough of Sunderland Act, 1851.

Before and at the time of the notice hereafter mentioned there was an open yard immediately behind the house, and at the end of it next the back street was a coach-house and stable one story in height. The yard was enclosed with walls and formed part of the hotel premises.

On the 16th of March, 1860, the appellant gave a written notice of his intention to make alterations and additions to his hotel. The Local Board of Health disapproved of the plan, and by their orders their engineer gave the appellant notice of such disapproval, giving as a reason the want of sufficient open space in the yard.

Notwithstanding the disapproval of the Board the appellant commenced erecting the building, partly on the open yard behind the house, and partly upon the coach-house and stable which were pulled down below the ground floor. The height of the building is three stories. On the ground floor there was avowedly intended to be a billiard room, shoe-house and smoking room; and there is a passage from the old building (which passage was a portion of the old yard) to the back street. The entrance to the smoking room, shoe-house and billiard room is direct from the old or main

shall stand and which shall belong thereto, reckoning from the front wall of the said dwelling-house to the outer back and side walls of the premises, free from any erection thereon above the level of the ground."

12. "Wherever any open space

has been left belonging to a building, either on the front, back or sides thereof, when the sanction of the local Board has been obtained for its erection, such space shall never afterwards be built upon without the approval of the local Board."

building through the passage. There is also a coach-house on the ground floor, the entrance to which is from the back street. There is no staircase or other entrance from the ground floor to the rooms in the upper stories. The entrance to these rooms is by a staircase built out from the old house and over a corresponding amount of what was formerly open space, and cannot be approached except by going up the staircase of the old house. The yard or open space is capable of being used for both old and new buildings.

The new erection occupies a space of 1713 feet, and there is an open space at the side thereof of 871 feet, which space is the yard spoken of. The old building occupies a space of 1934 feet. If, therefore, the whole space left of the yard were to be considered appropriated exclusively for the new building, and the old building to have no yard at all, there would be a sufficient space left and no offence in that respect against the bye-law, but if the old and new buildings are to be regarded as one building there will be a deficiency of space of 634 feet; and so also, if the old and new buildings are to be regarded as separate buildings, and the space to be enjoyed by both equally, there will be a deficiency of one-third space of 354 feet in respect of the old building and 280 feet in respect of the new building; so that in either of these cases there would not be one-third open space left.

It was admitted by the engineer for the respondents that he could not get into the ground floor of the new erection without entering by the door of the front house, or by the passage door that formerly led to the old house.

The appellant contended:—First, that the proviso in the 34th section of the Local Government Act, that no bye-laws should affect any building erected before the date of the constitution of the district, extended to this case, as the new erection was only an extension of the old house and built within its curtilage.

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Secondly.—That the bye-laws only extended to buildings adjoining new streets.

Fifthly.—That one-third open space had actually been left, there being an excess of the requirement of ten feet excluding the old building from the computation, &c.

Sixthly.—That there was no evidence that the building was intended to be used for sleeping rooms, neither was the same finished, nor has it ever been occupied or fit for occupation.

As to the first and second objections, the justices were of opinion that they were met by the 34th section of the Local Government Act, 1858, the stables and coach house having been pulled down to the ground floor and built upon.

As to the fifth objection, the justices were of opinion that the buildings erected in the yard being a new building built up to and adjoining an old one, must either be considered with the old building as one house, or that the old house and the new buildings must be considered as two erections; and that both the old and new buildings must be considered in reckoning the ground upon which the building stands, and that as there is access for both buildings to the open space, the new building could not have the exclusive use of the yard.

As to the sixth objection, they considered that the buildings were intended for human habitation. They, therefore, proceeded to convict the appellant of a breach of the eleventh bye-law, for that he “did erect a certain building intended to be used as a dwelling-house without having at the rear or at the side thereof an open space exclusively belonging thereto, to the extent of one-third of the entire area of the ground on which the said dwelling-house stands contrary to the provision in the eleventh bye-law,” &c.

Second Case.

The facts, as to the building of the premises in question by

the appellant, are to a great extent the same as those in the former case, arising from one act of building,—the offence in the former case being for building without leaving sufficient open space for sanitary purposes,—and the offence in the present case being for building immediately adjoining a back street, contrary to the first bye-law made by the Sunderland Corporation, being the Local Board of Health.

The appellant being possessed of the hotel, yard, coach-house and stables, mentioned in the first case, the coach-house and stabling adjoining Back Fawcett Street, pulled down the coach house and stable below the level of the ground floor, and then, without the sanction of the Local Board of Health, erected a building on the site of the coach-house and stables, and extending beyond them into the adjoining yard.

The appellant contended (*inter alia*), that the first bye-law was void as not being authorized by the Local Government Act, 1858. Secondly, assuming the bye-law to be legal it did not apply to this case; that the heading of the first bye-law distinctly pointed out that new streets only were in question, and that new buildings might be erected adjoining any old back street, and yet no offence be committed.

The justices found that the evidence was distinct that a building was in course of erection adjoining a back street and was intended for human habitation, though no evidence was given that the rooms were intended to be used as sleeping rooms. The coach-house and stables were pulled down below the level of the ground floor. The buildings were new though the street was old.

The appellant was convicted of an offence against the first bye-law, for that he “did build a certain dwelling-house, in the said borough, immediately adjoining a certain back street therein, called Back Fawcett Street, without the special permission of the Local Board,” &c.

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Manisty, in support of the convictions.—The 11th bye-law directs that “every building to be erected and used as a dwelling-house shall have in the rear or at the side thereof an open space exclusively belonging thereto, to the extent, at least, of one-third of the entire area of the ground on which the said dwelling-house shall stand. [*Martin*, B.—It would appear that this bye-law is intended to govern the mode in which *new* houses are to be built.] The bye-laws are made in pursuance of the 21 & 22 Vict. c. 98, s. 34, which contains a proviso that “for the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, &c., or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building.” [*Pollock*, C. B.—The expression pulling down of a building in this section seems to refer to cases where the whole building is taken down.] The meaning of the bye-law is that if a building is taken down, and a new building erected on the site of it, it is to be treated as if it were wholly a new building. [*Pollock*, C. B.—There are a great number of houses in London and other places where the open space is not a sixth of the area on which the house stands. Suppose a wash-house in the yard of such a building was out of repair and pulled down, might it not be rebuilt?] On the other hand, it is not right that a person who owns a large hotel, having a proper space for ventilation, should be at liberty to block it up by erecting a building three stories high, the object of the bye-law being that throughout the whole town one-third of the area of ground occupied for habitations should consist of open space. The justices were competent to decide that a building of three stories high, consisting of a billiard and other rooms, with apartments over them, was a dwelling-house. [*Bramwell*, B.—Suppose the owner of a house one story high built rooms over the ground floor, that would not

be a *new dwelling-house* ; but if a person erected a detached building with sleeping-rooms at the bottom of his garden, that would be a new dwelling-house. Therefore, whether this was a new dwelling-house or not was a question of fact.] The Court will not on that point review the decision of the justices. [*Pollock*, C. B.—We have all the facts before us. I think this was not a dwelling-house in the ordinary sense, but only an addition to an existing dwelling-house. *Martin*, B.—The language of the bye-law does not appear to apply to the case where an old building is enlarged.] The bye-law applies to “every building to be used as a dwelling-house”—that is, either wholly or in part.

As to the second conviction. The first bye-law provides that no dwelling-house shall be built immediately adjoining any back street, without the special permission of the Local Board. [*Martin*, B.—The heading of the bye-law is, “width and level of new streets.” This is an old street.]

Hindmarch, who appeared for the appellants, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that these convictions cannot be sustained. The first bye-law by its heading professes to deal with nothing but new streets, and if there is any ambiguity in the language of the subsequent part of it, it must be held to apply to new streets only. It classes new streets as front streets, cross streets, and back streets, and then goes on to say, “No dwelling-house shall be built immediately adjoining any back street” without permission. That refers to such streets as are before spoken of.

As to the 11th bye-law, Mr. *Manisty* was right in calling upon us to give effect to the obvious scope of the Act so far as the language of it would enable us. But being an Act in restraint of the use which a person may make of

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his own property, coupling such restraint with pains and penalties, we must be careful to see how far the restraint is really imposed by the Act. We are not at liberty to consider what the Legislature would have done if this particular case had been before them, but must see what they have done. On reading the 11th bye-law, I cannot come to the conclusion that it applies to the case of a person who pulls down a building in the rear of his dwelling-house, such as a wash-house or beer-cellar, and builds a small room in the place of it. Mr. *Manisty*, with great ingenuity pointed out that if a building like this of three stories had been erected, the object of the Legislature would have been defeated. I think that not unlikely; but I cannot distinguish between a large and a small adjunct to an existing dwelling-house. It would have been different if the appellant had built a *separate dwelling-house*, which he could have let or used for his own purposes as such. Here, however, there was an old house, which, *primâ facie*, is not within the Act, with a coach-house and stable. The coach-house and stable were pulled down, and an addition made to the house. The addition of one or two bedrooms to a house does not bring it within the 11th bye-law, and though the appellant has made a large addition, it is a mere difference in degree, and does not affect the principle.

MARTIN, B.—I am of the same opinion. As to the conviction on the first bye-law; the bye-law is made in pursuance of the 21 & 22 Vict. c. 98, s. 34, by which every Local Board is empowered to make bye-laws “with respect to the level, width and construction of new streets, and the provisions for the sewerage thereof,” &c. The heading of the bye-laws follows the words of the Act, and the first bye-law is headed “Width and level of new streets.” It makes provision for the width of streets when the houses are of a certain height, and defines what is meant by

back street; and then provides that "no dwelling-house shall be built adjoining any back street." It is plain that what the bye-law is dealing with is the width of *new* back streets. To this street, which is an old street, the bye-law does not apply.

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As to the conviction on the 11th bye-law, my impression is, that the Act gives the Local Board power to make bye-laws with respect to the alteration of existing buildings; but I do not wish to give a decided opinion on the point. However that may be, in my judgment the 11th bye-law does not apply to such a building as that now in question. The words "every building to be erected and used as a dwelling-house" point to dwelling-houses to be built—new buildings of which a dwelling-house is the principal part. Such building is to have "an open space exclusively belonging thereto to the extent of one-third of the entire area of the ground on which the dwelling-house shall stand, and which shall belong thereto." Here was an old building, the hotel; part of the space behind was covered by a coach-house and stable, which the owner intended to convert into hotel buildings. It appears to me that any open ground at the back did not belong to the new buildings, but to the hotel. It would be impossible to apply this bye-law unless we could read it as providing that no new building shall be added to an old house unless an open space is left equal to one-third of the whole space occupied by both the old and new buildings and the ground belonging thereto.

BRAMWELL, B.—I think that we ought to give the plain, natural and obvious construction to this bye-law; and, doing so, I come to the conclusion that the respondents must fail. I had some little doubt upon the first bye-law; but, as pointed out by my Lord and my brother *Martin*, the bye-law is headed "Width and level of new streets,"

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and one would think that was a general heading which everything subsequent was to be referred, according to the mode of construction adopted by the House of Lords in *Marriage v. The Eastern Counties Railway*. Then come these words, "A back street shall mean a street with which the back doors leading from yards and houses shall communicate." Taken by itself, that might mean a new street. But I come to the conclusion that it does not. It is reasonable when people are laying out new streets to say that they shall lay them out in a particular manner; but it is a very different thing to say that people whose streets have been laid out long ago shall only make a particular use of it. The expression "*It is intended* that a front street shall mean," &c., with which the clause commences, is intended to shew that the framers of the bye-law meant to give it prospective operation, and had in view future streets; therefore, it appears to me that the next provision, that no dwelling-houses shall be built immediately adjoining any street without leave, applies only to new streets.

As to the 11th bye-law, it appears to me that this building is a dwelling-house; that being a matter of fact which the justices have found. But is it a new dwelling-house, or the old one? If the justices had found this distinctly, the authority of *Newman*, app., *Baker*, resp. (b), I think could not have reviewed their decision. But I think the justices have not determined this as a question of fact, but have referred it to us, because they say, We were of opinion that the "building erected in the yard being a new building, built up and adjoining the old one, must either be considered with the old building as one house, or that the old house and the new erection must be considered as two distinct buildings." Thus, they say, assuming this to be a new building or an addition to an old building, the appellant was properly convicted. In that they are wrong. So far as the question

(a) Not yet reported.

(b) 8 C. B., N. S. 200.

is referred to us, I think that this was an addition to the old building, and not a new building. The bye-law does not apply when the new erection is a mere addition to an old building, and this erection is either an addition to the old house, or the justices have not found the fact which is essential to the validity of the conviction.

Determinations of justices reversed.

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May 7.

THIS was an interpleader issue, to try whether certain goods, taken in execution by the sheriff of Surrey, under a writ of fi. fa. issued on a judgment recovered by George Terry (the now defendant) against one Beaty, were at the time of the seizure the property of the now defendant, as against James Darvill (the now plaintiff.)

At the trial, before *Channell, B.*, at the Middlesex Sittings in the present Term, the following facts appeared.—On the 9th of January, 1861, Beaty executed a bill of sale, by way of mortgage, of certain goods in his possession, as a security for 130*l.*, previously lent him by the plaintiff, and a further loan of 160*l.* By the terms of the deed the above sums were to be repaid, with interest at the rate of 5*l.* per cent., on the 29th of July, 1861, and until default in payment Beaty was to keep possession of the goods. There was an indorsement on the deed of the receipt of the 160*l.* by Beaty, on the 9th of January, 1861, but the money was not, in fact, paid, nor the execution attested, until the 11th of January, the bill of sale having remained until that time in the hands of the attorney who prepared and attested it. The bill of sale was registered, under the 17 & 18 Vict. c. 36, as if executed on the 9th of January. On the 16th of January Beaty presented a petition to the Court of Bank-

A bill of sale by way of mortgage of personal chattels, if executed as a security for money actually lent, is not fraudulent and void within the 13 Eliz. c. 5, though its object is to defeat the expected execution of a judgment creditor.

The registration, under the 17 & 18 Vict. c. 36, of a bill of sale as of the day of its execution, is not invalidated by reason of the consideration money not having been paid, nor the deed attested until two days after the execution.

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ruptcy for an arrangement with his creditors, and obtained an order for protection of his person and goods from cess until the 12th of February. On the 29th of January this petition was dismissed, and on the same day the sheriff seized the goods of Beaty under a writ of *fi. fa.*, issued a judgment obtained against him by the now defendant.

It was submitted on behalf of the defendant, first, that the bill of sale was not executed *bonâ fide*, and with intention of vesting the property in the goods in the plaintiff, but was a mere contrivance for the purpose of defeating the defendant's execution, and consequently void under the 13 Eliz. c. 5. Secondly, that the consideration money not having been paid until two days after the bill of sale was executed, there was no valid registration under 17 & 18 Vict. c. 36, s. 1.

The learned Judge left it to the jury to say whether, taking all the circumstances into consideration, the bill of sale was *bonâ fide*—the transaction it purported to be merely colourable. If they were of opinion that it was the intention of the parties that the goods should continue to be the goods of Beaty, and that the bill of sale was resorted to for the purpose of defeating the defendant's execution and without any intention that the property should pass to the plaintiff, then the bill of sale, though good in fact, would be void; and (as described by counsel) a mere "sham" or contrivance of no avail in law. But if the jury were of opinion that the parties really intended that which the transaction purported to be, viz., in consideration of money advanced, to pass the property in the goods to the plaintiff, though with the right in Beaty to retain possession of the goods until default in payment of the money advanced, was no objection to the bill of sale that the parties had entered into that arrangement with a view of defeating the defendant's execution. The jury found that the transaction was *bonâ fide*, and a verdict was entered for the plaintiff.

Montagu Chambers now moved for a rule to shew cause why a new trial should not be had on the ground of misdirection.—The case was not properly left to the jury. The learned Judge should have told them that, if they were of opinion that the object of the bill of sale was to defeat the execution creditor, it was fraudulent and void as against him, though good as against the party executing it. The transaction is within the scope of the 1st and 2nd sections of the 13 Eliz. c. 5, and is not protected by the 6th section. Whether it was the intention of the parties to vest the property of the goods in the plaintiff is not the question; but whether the deed was meant to protect the goods of the debtor if the execution creditor attempted to assert his right. [*Channell, B.*—You contended at the trial that the not taking possession of the goods was a test of fraud. But this bill of sale is by way of mortgage, and, although its object may have been to defeat an execution, that would not, of itself, render the bill of sale void: it is a fact to be taken into consideration, but is not conclusive. The 13 Eliz. c. 5 was intended to apply to voluntary conveyances for the purpose of defeating creditors, not to cases where there is a valid consideration for the conveyance. *Martin, B.*, referred to the judgment of *Parke, J.*, in *Martindale v. Booth (a)*.] A party has no right to advance money to a debtor and obtain a mortgage of his goods simply for the purpose of defeating an execution creditor. The authorities collected in *Smith's Lead. Cas.* vol. 1, p. 10, 4th ed., shew that such a transaction is fraudulent, within the meaning of the 13 Eliz. c. 5. In *Nunn v. Wilsmore (b)* *Le Blanc, J.*, said: "Whether or not a deed is to be considered as fraudulent with respect to creditors, must depend on the motives of the party making the deed." That doctrine has never been overruled.

(a) 3 B. & Adol. 498. 505.

(b) 8 T. R. 521. 530.

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[*Wilde B.*—In *Wood v. Dixie (a)*, *Coltman, J.*, told the jury that “if there really was a payment, still, if the intent of the transaction was to defeat the execution creditor, the conveyance was void as against him,” but the Court held that a sale of property for good consideration is not, either at common law or under the statute 13 Eliz. c. 5, fraudulent and void, merely because it is made to defeat the execution of a judgment creditor.]—He also argued that the jury were misled by the use of the word “sham.”

Secondly, the bill of sale was not duly registered, as required by the 17 & 18 Vict. c. 36, and is therefore void against the execution creditor. It was executed by Beesley on the 9th of January, and the consideration purports to have been paid, and the execution to have been attested on the same day; whereas, in fact, the consideration was not paid, nor was the execution attested, until the 11th of January. The object of requiring the registration of bills of sale, was to protect creditors from fraud on creditors, by enabling them to ascertain the time when they were given. The execution, attesting the payment of the consideration and registration, ought to take place on the same day. If not, the Act would afford no protection to creditors against fraud; for a bill of sale might be executed by a debtor, without any consideration being paid to him, or any intention that it should operate as a sale. If an execution creditor seized the goods, and then the consideration would be paid, and the bill of sale registered. [*Wilde, B.*—The registration required by the Act is only a true statement of what the bill of sale purports to be.]

POLLOCK, C. B.—I am of opinion that there ought to be no rule. The objection to the direction of the learned Judge is based on two grounds. First, it is said that he did not sufficiently point out to the jury that the bill of sale was not duly registered.

(a) 7 Q. B. 892.

Montagu Chambers now moved for a rule to shew cause why a new trial should not be had on the ground of misdirection.—The case was not properly left to the jury. The learned Judge should have told them that, if they were of opinion that the object of the bill of sale was to defeat the execution creditor, it was fraudulent and void as against him, though good as against the party executing it. The transaction is within the scope of the 1st and 2nd sections of the 13 Eliz. c. 5, and is not protected by the 6th section. Whether it was the intention of the parties to vest the property of the goods in the plaintiff is not the question; but whether the deed was meant to protect the goods of the debtor if the execution creditor attempted to assert his right. [*Channell, B.*—You contended at the trial that the not taking possession of the goods was a test of fraud. But this bill of sale is by way of mortgage, and, although its object may have been to defeat an execution, that would not, of itself, render the bill of sale void: it is a fact to be taken into consideration, but is not conclusive. The 13 Eliz. c. 5 was intended to apply to voluntary conveyances for the purpose of defeating creditors, not to cases where there is a valid consideration for the conveyance. *Martin, B.*, referred to the judgment of *Parke, J.*, in *Martindale v. Booth* (a).] A party has no right to advance money to a debtor and obtain a mortgage of his goods simply for the purpose of defeating an execution creditor. The authorities collected in *Smith's Lead. Cas.* vol. 1, p. 10, 4th ed., shew that such a transaction is fraudulent, within the meaning of the 13 Eliz. c. 5. In *Nunn v. Wilsmore* (b) *Le Blanc, J.*, said: "Whether or not a deed is to be considered as fraudulent with respect to creditors, must depend on the motives of the party making the deed." That doctrine has never been overruled.

(a) 3 B. & Adol. 498. 505.

(b) 8 T. R. 521. 530.

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[*Wilde B.*—In *Wood v. Dixie (a)*, *Coltman, J.*, told the jury that “if there really was a payment, still, if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him,” but the Court held that a sale of property for good consideration is not, either at common law or under the statute 13 Eliz. c. 5, fraudulent and void, merely because it is made to defeat the expected execution of a judgment creditor.]—He also argued that the jury were misled by the use of the word “sham.”

Secondly, the bill of sale was not duly registered, as required by the 17 & 18 Vict. c. 36, and is therefore void as against the execution creditor. It was executed by *Beaty* on the 9th of January, and the consideration purports to have been paid, and the execution to have been attested on that day; whereas, in fact, the consideration was not paid, nor was the execution attested, until the 11th of January. The object of requiring the registration of bills of sale, was to prevent fraud on creditors, by enabling them to ascertain the real time when they were given. The execution, attestation, payment of the consideration and registration, ought to take place on the same day. If not, the Act would afford no protection to creditors against fraud; for a bill of sale might be executed by a debtor, without any consideration being paid to him, or any intention that it should operate until an execution creditor seized the goods, and then the consideration would be paid, and the bill of sale registered. [*Wilde, B.*—The registration required by the Act is only a true statement of what the bill of sale purports to be.]

POLLOCK, C. B.—I am of opinion that there ought to be no rule. The objection to the direction of the learned Judge is based on two grounds. First, it is said that he did not sufficiently point out to the jury that the bill of

(a) 7 Q. B. 892.

sale, if given to defeat a judgment creditor, was void as against him. But there are many circumstances under which a conveyance by a debtor of his property is valid, although its object is to defeat creditors. The most remarkable case is where a debtor voluntarily assigns over his property for the benefit of his creditors; and such assignment is valid, though made for the express purpose of defeating a particular creditor. Here, if the mortgage was *bonâ fide* for the consideration of 160*l.*, and the money was actually paid, the transaction may well be sustained under the present view of the law (which has varied from that as laid down in the earlier cases,) although the intention was to defeat an execution creditor. In the case of *Wood v. Dixie* (*a*), *Coltman, J.*, laid down the law precisely as *Mr. Chambers* says that it ought to have been laid down in the present case, but the ruling of the learned Judge was corrected by the Court of Queen's Bench.

Then, as regards the registration, the jury have found that the transaction was *bonâ fide*, and that the 160*l.* was actually paid. It is true that the deed was executed one day and the money paid a few days afterwards, but there is nothing in the Act requiring registration which says that if the consideration is not paid at the time the bill of sale is executed it shall be void. If the consideration had not been paid, and never was meant to be paid, the case would have been different; but the evidence shews that the parties intended that it should be paid, and that it was paid. It seems to me, therefore, that there is no valid objection to the registration, and that no rule ought to be granted on either ground.

MARTIN, B.—I am also of opinion that there ought to be no rule. The first point raised by *Mr. Chambers* was

(*a*) 7 Q. B. 892.

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expressly decided in the case of *Wood v. Dixie* (a), was determined in the year 1845; so that for upwards of fifteen years the law on this point, with respect to the sale, has been settled. The precise point which has been raised to-day was raised in that case, viz., whether, when a debtor executes a bill of sale, by way of mortgage of his property as a security for money lent, if the object be to defeat the execution creditor, the bill of sale is void. *Wood v. Dixie* is an express authority that it is not; in that case *Man, J.*, told the jury that, if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him, and the Court of Queen's Bench followed that direction wrong. I am not aware of any case in which the law so laid down has since been disputed.

Then, with respect to the other point.—All that the Bills of Sale Registration Act requires is that every bill of sale, with its schedule, or a true copy thereof, and every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale made or given, and a description of the residence and occupation of the person making or giving the bill, and of every attesting witness, be filed within twenty days after the making of it. That has no reference to the payment of the consideration money. All that is necessary is to register the bill of sale and particulars as required by the Act; and if that be done, the most fraudulent bill will be well registered. The real fact is, that this bill of sale was executed on the 9th January and the money not paid until the 11th, the bill of sale remained in the hands of the attorney who prepared it until the money was paid. During the whole of that period it was a continuing transaction, which commenced on the 9th and was perfected on the 11th.

(a) 7 Q. B. 892.

WILDE, B.—I am of the same opinion; and I concur in the law as laid down by my learned brothers.

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CHANNELL, B.—I agree with the rest of the Court on both points. In summing up, I used the word “sham” because that word had been frequently used by the counsel in their address to the jury, but I think I explained to the jury, so as not to be misunderstood, in what sense I used it.

Rule refused.

REID and Another v. DREAPER.

May 8.

DECLARATION.—That, by agreement between the plaintiffs and the defendant, the defendant bargained and sold to the plaintiffs, and the plaintiffs bought of the defendant, two cargoes of white French maize, one to consist of from 800 to 1000 quarters, to be shipped by the 20th of April, A.D. 1860, and the other to consist of about 1000 quarters, to be shipped during the said month of April, both from the port of Bordeaux, and to be delivered to the plaintiffs at 33s. 3d. per 480 lbs., including cost and freight, the said price to be paid in London, less sixty days' interest, and one per cent. brokerage; and the defendant thereby also agreed that J. Walker should send to the plaintiffs contracts embodying the said terms: that all conditions were performed, and all times elapsed necessary to entitle the plaintiffs to have the said contracts sent to them

D., the defendant, entered into the following contract with R., the plaintiffs:—“22nd March, 1860. From J. D., Corn Broker, To Messrs. R. Liverpool. Dear Sirs,—I have this day sold to you two cargoes of French maize, to consist of 800 to 1000 quarters, shipment all April, from the port of Bordeaux, at 33s./3d. per 480lbs. cost and freight, payment in London, less 60 days' in-

terest and 1% brokerage. Mr. J. Walker, London, will send contracts.” On the following day Walker forwarded contracts for the two cargoes on behalf of T. of Bordeaux, the owner of the maize, but omitting the stipulation as to the brokerage. The plaintiffs remonstrated, and the defendant said he would write to Walker, but the plaintiffs, in order to obtain the cargoes, were subsequently compelled to pay the 33s. 3d. without any deduction for brokerage.—*Held*, that the defendant was responsible for the failure of Walker to send the contracts stipulated for.—And *semble*, per *Martin*, B., and *Bramwell*, B., that the defendant's liability was not affected by the fact that the plaintiffs, instead of returning the contracts sent by Walker, accepted the maize under them.

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by the said J. Walker, and to have the maize delivered to the plaintiffs at the said price, less interest and brokerage, yet the said J. Walker did not at any time send to the plaintiffs contracts embodying the said terms, nor was maize delivered to the plaintiffs at the said price, less interest and brokerage, &c., but the plaintiffs, in order to obtain the delivery of the maize, were obliged to pay the same the price without being allowed to deduct interest and brokerage of one per cent., &c. Second count—That in consideration that the plaintiffs would, at the defendant's request, enter into a contract with the defendant for the purchase of certain maize at a certain price, the defendant promised the plaintiffs that they should be paid or allowed a brokerage of one per cent. on the said price, and the plaintiffs accordingly, at the defendant's request, entered into the said contract with the defendant on the terms aforesaid: that all conditions were performed, &c., and all that happened, yet they have not been paid or allowed same, &c.

Pleas (inter alia).—First: Non assumpsit. Second: That the defendant did not commit the breaches. Fourth: That after the contract, and before any breach therein was agreed by and between the plaintiffs and the defendant that the said contract and agreement should be void, abandoned and rescinded, and the same was voided, abandoned and rescinded accordingly.

The plaintiffs took issue on the pleas.

At the trial, before the Assessor of the Court of Passes of the Borough of Liverpool, it was proved that the plaintiffs, who were corn merchants at Liverpool, being induced to buy corn for a correspondent, entered into the following contract with the defendant, a corn broker, the words of the contract being written under a printed heading:—

" MEMORANDUM.

" From

John C. Dreaper,
 Corn Broker,
 Liverpool.

22nd March, 1860.

To

Messrs. Reid and Glasgow.

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" Dear Sirs,

I have this day sold to you two cargoes of white French maize, one to consist of 8½ 1000 qrs., shipment by the 20th of April; another about 1000 qrs., shipment all April; both from the port of Bordeaux, at 33s. 3d. ¾ 480 lbs., cost and freight, payment in London, less 60 days' interest and 1 ¼% brokerage. Mr. J. T. Walker, London, will send contracts."

The defendant said he would telegraph to London. On the 23rd of March the plaintiffs received from the defendants the following documents:—

" London, 50, Mark Lane,

" 22nd March, 1860.

" Sold for Monsieur Ticher, fils ainé, of Bordeaux, per John Thos. Walker,

" To Messrs. Reid & Glasgow,

" of Liverpool,

" A cargo of about 1000 quarters white maize, of fair average quality, for shipment at Bordeaux (by a first class vessel), in sound merchantable condition, before the 20th of April next, at 33s. 3d. per 480 lbs., including cost, free on board and freight to a safe port of discharge in United Kingdom. Destination to be given by buyers in due time.

" Weight to be calculated at 1015 kilos. French as equal to the ton English, and payment by cash against shipping documents, less 60 days' interest at 5 ¼% per annum.

" John A. Wheeler & Sons,

" As agents."

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The other contract was similar in its terms.

The plaintiffs at once pointed out to the defendant the terms, that the brokerage of one per cent. should be allowed, and were omitted. The defendant said he had observed the omission, and would write to Walker about it. The plaintiffs gave the defendant notice that they should hold him responsible for the brokerage. They afterwards received the maize, which they paid for in full without deduction for the brokerage, and brought this action to recover 28*l.*, being the brokerage at 1 per cent. The learned Assessor nonsuited the plaintiffs, reserving leave to them to move to enter a verdict for 28*l.*, and accordingly,

Aspinall, in this Term, obtained a rule to enter a verdict for the plaintiffs, on the grounds that there was evidence that the plaintiffs were entitled to the deduction on brokerage claimed, and that they were also entitled to the contracts from Walker, embodying these terms.

Leofric Temple now shewed cause.—First, the plaintiffs should have repudiated the contracts as sent by Walker. Instead of doing so they chose to adopt them as sent. Secondly. The contract shews that the defendant was a broker. A broker is an agent, and, in order to make an agent liable upon a contract, it must appear on the face of it that the intention of the parties is that he shall be personally bound.

Aspinall, in support of the rule.—The defendant did not make this contract as agent merely. There is nothing to exclude his personal liability upon it. The description "broker" is consistent with the presumption of his having contracted as principal. The actual principal was not known at the time of the contract: Walker himself was a middleman. In *Parlier v. Window* 2, where a claim

(10) 7 H. & S. 342

party was expressed to be made "between P., of the good ship *C.*, and G. W., *agent for E. W. and Son,*" to whom the ship was to be addressed, and was signed by G. W. without restriction, it was held that G. W. was personally liable. In *Deslandes v. Gregory (a)*, where the contract was made by "Gregory Brothers, *as agents to S. F.*" and signed "for S. F. Gregory Brothers *as agents,*" it was held that Gregory Brothers were not liable as principals. There *Crompton, J.* points out that the rule is "that persons signing a document, if they wish to *exclude* their own liability, must shew that they sign for some other person." *Lennard v. Robinson (b)* was decided upon that principle. [*Wilde, B.*—In the present case, there is nothing on the face of the instrument to shew that the defendant contracted as agent.] Again, suppose the defendant had no authority to bind his principal as to the term that the plaintiffs were to be allowed brokerage; then, as it must be conceded, that if the defendant had entered into this contract wholly without authority he would have been responsible; he is equally responsible for having inserted in the contract one clause as to which he had no authority to bind his principal. *Tanner v. Christian (c)* is an instance where an agent, contracting that his principal should do a certain act, was held responsible upon his contract.

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POLLOCK, C. B.—We are all of opinion that the rule must be absolute to enter a verdict for the plaintiffs. The first count of the declaration sets out the contract contained in the memorandum of the 22nd of March, and the only question is whether the contract declared on was proved. It is not necessary to consider whether the defendant was bound as to the whole or a portion only of the matters to which the

(a) 29 L. J., Q. B. 93.

(b) 5 E. & B. 125.

(c) 4 E. & B. 591.

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contract relates; because it is clear that he did agree that Walker should send contracts containing certain terms. In consequence of the refusal of Walker to do so, the plaintiff sustained a loss in respect of which he is entitled to recover in this action.

MARTIN, B.—The facts appear to be that the defendant had received a communication from Walker that he had these cargoes of maize for sale. An agreement was made that the plaintiffs should purchase from the defendant principal two cargoes of maize at certain prices, less sixty days' interest and one per cent. brokerage, and that Walker should send contracts. In effect, the defendant, a broker, contracted that he had authority to sell on the terms he had thus agreed on with the plaintiffs and that Walker should send formal contracts on the same terms. That was the personal contract of the defendant made by him as principal. If that is not so, a broker makes no contract at all. If a person gives authority to a broker to sell goods for him, and the broker sells naming the principal, the broker is not liable. But here the defendant sold in *his own name*, and agreed that Walker should send contracts, that is, contracts containing the terms before mentioned. Walker would not insert, in the contracts sent by him, the stipulation as to the deduction of brokerage. It is said that the plaintiffs might have returned the contracts. But were they bound to return them? I think they were not, and that they were entitled to keep the maize. If not, in the event of a rise in the market the vendor would be able to put the vendee in the position of being obliged either to lose the benefit of an advantageous contract, or to accept the goods on terms less advantageous than those contracted for.

BRAMWELL, B.—I do not think this a clear case. The question is, what is the meaning of the memorandum signed by the defendant? First, it may mean that the defendant contracts personally, so as to be liable if the maize is not sent from Bordeaux. Or, secondly, that the defendant contracts for a third person. Or, thirdly, that in respect of the sale he contracts for another, but binds himself that contracts shall be sent by Walker. But for the words “Walker, London, will send contracts,” I should infer that the defendant was liable as principal. In a case put by my brother *Wilde* during the argument, of a house-agent saying to a person “I will let you a house,—A. shall send the contract,” the inference would be that the house agent did not bind *himself* to let the house. Suppose Walker had sent contracts in the terms of the defendant’s contract, and the maize never arrived, would the defendant have been liable? On the whole I think the question would be, Are the contracts sent those which were to come from London? If not, the defendant is liable. The contract stated in the first count is therefore proved. I am inclined to think that the defendant’s liability is not affected by the fact that plaintiff did not send back the contracts forwarded by Walker. But, if there is anything in that point, it should have been raised by plea.

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WILDE, B.—I also think that the verdict must be entered for the plaintiffs. The defendant was a broker at Liverpool employed through Walker, of London, for a foreign principal to sell two cargoes of maize. If the defendant had authority to sell in the way in which he did, Ticher was his principal, but undisclosed. When the principal was disclosed, the plaintiff might have had an option, if the maize was not delivered or the contract otherwise not performed, to sue either the principal or the agent. The defendant was

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either authorized to make the contract, I have shewn that the plaintiff at their election. If not, the defendant assumed to make a contract for his not authority to make. Therefore the defendant would have been liable on either viz. as well for a failure to deliver breach of his agreement that written sent by Walker. It may be that Walker had been in all respects the defendant's contract, we might the defendant's contract as stipulating that he the sale of the corn by the principal should be disclosed, and completed, the defendant should be relieved open to argument. Then in plaintiffs' retention of the contract acceptance of the maize under the the defendant's liability. But there that point. The only plea which be viz. that before any breach it was should be waived, abandoned and evidence proves exactly the reverse.

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SMITH and Another v. WRIGHT.

May 3.

THE first count of the declaration stated that the plaintiffs by their bailiff had taken certain goods, to wit horses, which then were on certain lands and premises held and enjoyed by one G. Hickman, as tenant thereof to the plaintiffs, under a demise at a certain yearly rent, as and in the name of a distress for a certain sum, to wit 559*l.*, then due and in arrear from G. Hickman to the plaintiffs, for and on account of the said rent, and had impounded and secured the said goods in a certain pound on the most convenient part of the demised premises, with intent to appraise and sell the same according to the statutes, &c. And the defendant with force and arms broke the said pound, and rescued the goods contrary to the form of the statute, &c., whereby the plaintiffs have been delayed in recovering their said rent in arrear, and have been deprived of the means of obtaining satisfaction of the said rent, and of the costs and charges of the distress, and are likely to lose the same.

The second count (after stating the taking as above) alleged that the plaintiffs by their bailiff were about to impound the goods, with intent to appraise and sell the same according to the statutes, &c., and had the goods in their custody and possession under the distress, when the defendant, with force and arms, rescued, took and carried away the goods, and thereby prevented the plaintiffs from impounding the same as they otherwise would have done, whereby, &c.

the pit where they had been accustomed to work. One of the horses was placed in a moveable stable near the pit's mouth and the other in a skip ready to be let down into the pit. The defendant then forcibly took away both horses:—*Held*, that the distrainer having misused the distress, the defendant was at liberty to retake his property without being liable for a rescue or pound breach.

If a distrainer takes the distress out of the place where it was originally impounded, for the purpose of making an unlawful use of it, the owner may interfere and take it out of his possession without rendering himself liable either for a rescue or for pound breach.

The plaintiffs, the owners of a colliery, having distrained two horses belonging to the defendant for rent in arrear from one H., the lessee of the colliery, impounded them in the stable of an inn about half a mile from the pit. Two days afterwards the plaintiffs' servant brought the horses to the colliery for the purpose of letting them down into

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Pleas.—First: not guilty. Secondly, to the first count, That the plaintiffs did not impound and secure the goods. Thirdly, to the second count, that the said lands and premises were not held or enjoyed by G. Hickman, as tenant thereof to the plaintiffs, nor was the sum of 559*l.*, or a part thereof, due or in arrear, and that at the time of making of the said distress, and of the impounding thereof the goods in the second count mentioned were the goods of the defendant, and he had the right to the immediate possession thereof, and requested the plaintiffs to deliver the same to him, which they refused to do; wherefore the defendant took away the goods and prevented the plaintiffs from impounding them. The plaintiffs took issue on the pleas.

At the trial, before *Blackburn, J.*, at the Spring Sessions for the County of Staffordshire Assizes, the following facts appeared. One Hickman was tenant to the plaintiffs of a colliery under an ordinary mining lease, at the yearly sum of 50*l.*, as a surface rent, and a further sum by way of a mining rent. The lease contained a proviso for re-entry on nonpayment of the rent. The defendant was a butty collier under Hickman, and used his own horses in the mining operations. On the 8th of September, 1860, the plaintiffs distrained for the rent due from Hickman, and seized, amongst other things, three of the defendant's horses. These were removed from the demised premises to the stable of an inn, about half a mile off, and notice was given that they were impounded there. The plaintiffs then took possession of the mine and plant under the proviso for re-entry. On the 10th of September, by order of Murrell, one of the assessors acting generally for the plaintiffs, two of the horses were brought to the colliery for the purpose of being let down the pit, and employed in removing the timber. One of them was locked up in a moveable stable near the pit's mouth, and the other was placed on a skip ready to be let down the shaft. The defendant, with the assistance

of some other persons, broke open the stable and forcibly took away both the horses. The value of the horses was 20*l*.

It was objected, on behalf of the defendants, that neither of the counts of the declaration was proved,—the rescue being after the impounding, and after the removal of the horses from the pound for an unlawful purpose; that the case was not within the statute 2 W. & M. sess. 1, c. 5., and that treble damages were not claimed in the declaration. A verdict was entered for treble damages, under the statute leave being reserved to move to enter the verdict for the defendant.

Gray having obtained a rule nisi for that purpose,

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Pigott, Serjt., and *Matthews* shewed cause.—The distress was originally lawful; the horses were regularly impounded, and the defendant was guilty of a pound breach. At the time the horses were taken by the defendant they had been removed from the stable where they had originally been placed; but, though no doubt the plaintiffs' servants contemplated working them, they had not actually commenced. It is clear, upon the authorities, that the distrainer may impound the distress wherever he pleases: Com. Dig. tit. Distress (D. 1.) According to the rules there laid down, at the time of the rescue the horses were sufficiently impounded. It may, perhaps, be contended that the circumstance of the removal of the horses from the stable in which they were originally, makes a difference; but that is not so. In many cases some change of the place of pounding might become absolutely necessary. The original pound may cease to be in a condition proper for the safe custody of the distress; in which case it would clearly be proper to remove goods distrained to another pound: *Wilder v. Speer*(*a*). Mere change of place, therefore, does not necessarily destroy the

(*a*) 8 A. & E. 547.

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legality of the custody. It is said that the removal was for an improper purpose; but it will be found that all the cases in which the abuse of a distress has been held to make the distrainer a trespasser *ab initio*, the abuse has taken place before the impounding. The reason is clear: it is the duty of the distrainer at once to put the distress in the custody of the law: the omission to do so indicates an intention to apply the goods distrained to the use of the distrainer. In the case of a distress for rent, tender *after impounding* does not make the detainer tortious: *The Ship Carpenters' Case* (a). The principle upon which this proceeds applies equally to the case where, after impounding there is an abuse of the thing distrained. As soon as the distress is impounded it is in the custody of the law, and no longer in that of the distrainer. It is laid down by Chief Baron *Gilbert*:—"When the beasts are in the custody of the law, the person distraining cannot be said unlawful to detain what is in the custody and care of the law" (b). For the same reason a *parco facto* lay though the distress and impounding were without cause: *Com. Dig. tit. Distress* (D. 2). Since the statute 11 Geo. 2, c. 19, a sale of the distress, contrary to the enactment of 2 Wm. & M. c. 1, has been held not to make the distrainer a trespasser *ab initio*: *Wallace v. King* (c). [*Pollock*, C. B.—That was the case of a sale within five days which is an irregularity. Using the distress is a very different thing. Suppose the distrainer of a horse rode him out hunting, could not the owner stop him? *Wilde*, B.—Would you contend that the hunter was still in the pound?] The distress would be lawful, notwithstanding that the owner might have an action for the irregularity. [*Pollock*, C. B.—The act done was one which the distrainer was not authorized

(a) 8 Rep. 147 a; S. C. 1 Smith
Lead. Cas. 111.

(b) *Gilbert on Distress*, p. 63
(c) 1 H. Bl. 13.

to do at all,—not an irregularity, which is the doing something which the party has a right to do but in an improper manner,—but a wrongful act altogether. It put an end to the custody of the law, and took away the protection of the pound.] Surely a sale before the time permitted by the statute is a wrongful act, yet that does not render the distrainer a trespasser *ab initio*. [*Wilde, B.*—Doing a right thing at a wrong time is not the same as doing an act wholly wrongful.] In *Rodgers v. Parker* (a) *Jervis, C. J.*, says, in reference to the construction to be put upon the 11 Geo. 2, c. 19, s. 19:—"A subsequent irregularity is not to make the distrainer a trespasser *ab initio*. For the original taking there is to be no action; the distrainer is to be considered as being in possession of the goods, notwithstanding a subsequent irregularity." The defendant could not have maintained either trover or trespass: *Wallace v. King* (b). *Rodgers v. Parker* (a). [*Wilde, B.*, referred to *Winterbourne v. Morgan* (c).] At all events there was a clear act of trespass proved; the defendant could have no right to go upon the plaintiff's premises and break into his stable, and the Court has power to allow the declaration to be amended by the insertion of a count to meet the facts. [*Bramwell, B.*—The Court will not amend where the damages would be nominal.]

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Gray and Davis, who appeared in support of the rule were not called upon.

POLLOCK, C. B.—We are all of opinion that the rule should be absolute to enter the verdict for the defendant. We think that there was no pound breach, and no rescue. As to the application made to us to amend the

(a) 18 C. B. 112.

(b) 1 H. Bl. 13.

(c) 11 East, 395.

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declaration, I have no wish to encourage actions, which the statute gives treble damages, by turning them into actions of trespass, for the purpose of entitling a party to save his costs in cases where we think he ought to recover.

MARTIN, B.—I am of the same opinion. All the distrainer of goods obtained at common law was, not a property in the goods, but a sort of pledge; and the law shows how that pledge is to be used. No case has been cited to that, where the distress is being used in a manner which the law will not justify, the owner may not interfere to prevent the abuse; and it would be contrary to the spirit of the law if he were not permitted to do so. I have no doubt that on principle and reason, an owner of property which has been seized as a distress is entitled to prevent the use of it by the distrainer in a manner not allowed by the law. This is illustrated by a case, put by the Lord Chief Baron in the course of the argument, of a sheep being taken as a distress, and the distrainer afterwards attempting to kill it; and it is impossible to doubt that the owner would be justified in interfering to prevent him from doing so.

BRANWELL, B.—I am of the same opinion. The argument for the plaintiff comes to this: that, when once a distress has been impounded, the quality of "impoundment" sticks to it, so that it cannot afterwards be got out of pound. I cannot agree to that. The rule ought to be absolute.

WILDE, B.—I am of the same opinion. I can understand that in some cases questions of great nicety arise respecting the right of the owner of a distress to interfere with the distrainer in his dealing with it. In the

sent case the distrainer was guilty of a misuser, which was of a nature to leave no doubt as to the owner's right to interfere. Therefore, I think, there was no rescue : and I think also that there was no pound breach ; for it seems to me that, under the circumstances of this case, the horses cannot be considered, in any sense, to have remained in the pound, out of which they had in fact been taken. On these grounds I think that the rule should be absolute.

Rule absolute to enter the verdict
for the defendant (a).

(a) Reported by J. A. Yonge, Esq.

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v.
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EASTER VACATI

IN THE EXCHEQUER

(Appeal from the Court of Exchequer)

1861.

May 15.

CASTLE and Others

The plain-
tiffs, wine and
spirit mer-
chants, kept
a bonded
warehouse,
where they
took in other
persons' goods
as well as
their own,
charging ware-
house rent.
Of this ware-
house the
plaintiffs had
one key and
the custom-
house officer
another.
The defendant
agreed to
buy of the
plaintiffs two
puncheons

of rum which were to remain in bond till wanted, the defendant giving credit. The plaintiffs sent to the defendant an invoice describing the goods and numbers with the words "free six months," which might remain in the plaintiffs' warehouse without charge. The defendant entered in the rum book of their warehouse the puncheons and proved that after this entry they had no power to get them out of the warehouse for two years, during which time the defendant refused the plaintiffs to take back the goods or buy them of him.—The Court of Exchequer (reversing the decision of the Court of Common Pleas) directed the jury that the character in which the plaintiffs held the goods was as warehousemen for the defendant, there was evidence that the goods were wanted by the defendant so as to satisfy the 17th sec-

THIS was an appeal from the Exchequer in discharging a rule nisi for the plaintiffs, reported 5 H. & N. p.

The case on appeal set out a full statement of the evidence, which was as follows:—The plaintiffs, distillers and wine and spirit merchants, the defendant is a wine and spirit merchant in the county of Glamorgan.

Henry Penn.—Traveller for plaintiffs. I called on defendant, took order for rum and one of brandy. Sold by said defendant at his brewery in Dowlais. They were to have the rum and brandy wanted them. He was to have the rum and brandy

and at that time account to be due. I informed the plaintiff.
Invoice read:—

“Milk Street, Bristol,
“Mr. R. Sworder. “23rd February, 1857.

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CASTLE
v.
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“Bought of Castle and Company, distillers and
importers of foreign wines and spirits [DM] 2 pun^s rum,
ex Maria.

“138 98 31.7 p Ct.
“139 95 25.6

“193 galls. @ 4/2 - - 40 4 2

“Hhd. Bry. ex J. Lake.

“C C 456 57.41 p Ct. @ 14/ 39 18 0

“Free 6 months - - £80 2 2

“Sir,

“The above remain in bond and which you will find
of a very good quality, and hope will merit the continuance
of your favors. “Castle & Co.”

That price was market price. Saw him again several
times. After sale, brandy both rose and fell; shortly after, it
rose. After credit expired I presented the account. He
asked me if I would take the goods back or sell them for
him; he gave no reason. I said I would do nothing of the
kind. I subsequently applied. He asked me again to take
them back. I recommended him to apply to the house. It
is not uncommon for goods to remain in bond a long time
after they are sold and paid for.

Cross-examined.—I did not sell the brandy by sample.
Defendant declined to pay.

Nathaniel Fox, now partner with plaintiff.—I was a clerk
there; we sell goods to remain in bond till ordered. On
receiving advice from traveller we write off in our warehouse
bonding book, the goods in question. The goods were in
our bonded cellar in Bristol. We have one key and the

1861.
 {
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Customs another. It is not for our goods alone. We take in goods for other parties. We are the keepers and charge for warehouse room. "Free six months" means they may remain six months without charge. This is our book.—Entry read.

Rum Book, page 128.

Mark.	No.	Ullage.	Per Cent.	O.P.	Bonded by.	Ship.	Of whom Bought.	Ware-house.	To whom Sold.	When Sold.	Dip.	When Delivered.
[DM]	138	98	31.7	31	T. Daniel &							
	139	95	25.6	24	Sons,	Maria	rent free 6 months.		R.Sworder	23 Feb. 1857.		
					10th Dec. 1856.				Dowlais.			
The above from Rum Book.					Ex Demerara.							

After that entry we have no power of getting the goods out. This is our book. (There was a similar entry in the brandy book as to the cask of brandy).

This is the way we do it, and it is the custom generally at Bristol. Most wine merchants here have their bonded warehouse. When goods are warehoused in the warehouse of others a transfer order is lodged.

February 10th, 1859, defendant to plaintiffs:—

"Messrs. Castle & Co.

"Merthyr,

"Sirs,

"10th Feb. 1859.

"You will oblige by informing me the present value of the rum and brandy, that is to say, what you are willing to give for it.

"Yours truly,

"Robert Sworder."

The invoice identifies articles.

The order for the rum and brandy was a verbal one.

At the close of the plaintiffs' case the learned Judge directed the jury to return a verdict for the defendant, on the ground that there was no delivery or acceptance of the goods to satisfy the 17th section of the Statute of Frauds;

giving the plaintiffs leave to move to enter a verdict for the amount claimed, if there was any evidence on which the jury might find for the plaintiffs.

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 CASTLE
 v.
 SWORDER.

H. T. Cole argued for the plaintiffs (*a*).—There is evidence of an acceptance and receipt of the spirits sufficient to satisfy the 17th section of the Statute of Frauds. The defendant asked the plaintiffs' traveller to take the goods back; and on the 10th of February, 1859, two years after the date of the contract, wrote a letter asking the plaintiffs to name the price which they would give him for the spirits. That is a constructive dealing with the goods, and evidence of acceptance of them by the defendant. The plaintiffs had delivered to the defendant an invoice of the spirits, identifying the puncheons by marks and numbers, shewing that the plaintiffs had appropriated specific goods, and agreed to hold them for the defendant. After this appropriation of particular spirits to the contract by the plaintiffs, the goods were entered in the plaintiffs' warehouse book, and stood in their bonded warehouse as the goods of the defendant. The effect was, that the plaintiffs' position with respect to the goods was altered, and they had no power to get the goods out. The case therefore falls within the authority of *Elmore v. Stone* (*b*), where the plaintiff, a horse dealer and livery stable keeper, sold a horse to the defendant and by his direction removed it from his sale stable to his livery stable, and it was held that this was a sufficient delivery of the goods within the Statute of Frauds. The offer to resell the goods is evidence of acceptance: *Blenkinsop v. Clayton* (*c*). In some cases it has

(*a*) Before *Cockburn*, C. J., (*b*) 1 Taunt. 458.
Williams, J., *Crompton*, J., *Byles*, J., and *Keating*, J. (*c*) 7 Taunt. 597.

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been said that there can be no acceptance while the plaintiff has power to *object to the quality* of the goods. But that is contrary to *Morton v. Tibbett* (a), *Bushel v. Wheeler* (b) and *Browne v. Hare* (c). [Crompton, J.—Those cases at least establish that the power of objecting to the quality of the goods is not conclusive to shew that there has been no acceptance and receipt within the statute. *Cockburn*, C. J.—It must not be assumed that I assent to the decision in *Morton v. Tibbett* (d). Crompton, J.—Perhaps the true rule is, that there can be no acceptance while the purchaser continues at liberty to *reject* the goods as not being according to sample or contract.] In *Meredith v. Meigh* (e), it was suggested that the acceptance and retention of the bill of lading by the consignee might be equivalent to an actual receipt of the goods; and on that ground *Currie v. Anderson* (f) was decided. [Crompton, J.—In the case of *Meredith v. Meigh* (e) there must have been an invoice; but an invoice is not the *indicia* of property like a bill of lading.] The defendant could at any time have gone to the warehouse and obtained the goods on producing the invoice identifying particular casks as his. After having retained the goods, at the end of two years he is found to be dealing with them as his own. Surely that was evidence to be submitted to the jury that he had accepted them. The plaintiffs might have sued him for warehouse rent. In *Beaumont v. Brengeri* (g), a carriage having been purchased by a verbal contract, at the purchaser's request certain alterations were made in it, and it was removed by the seller into a back shop, the purchaser then called and

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| (a) 15 Q. B. 428. | W. 276, and <i>Hunt v. Hecht</i> , 8 |
| (b) 15 Q. B. 442, n. | Exch. 814. |
| (c) 4 H. & N. 822. | (e) 2 E. & B. 364. |
| (d) 15 Q. B. 428. He referred | (f) 29 L. J., Q. B. 87. |
| to <i>Norman v. Phillips</i> , 14 M. & | (g) 5 C. B. 301. |

requested the seller to hire a horse and man for him, and to send the carriage to his house on the following day that he might take a drive in it, having previously intimated his intention to take the carriage out a few times in order that, as he was about to take it abroad, it might pass the Custom-house as a second hand carriage; it was held that this was evidence of the acceptance of the carriage. So in *Parker v. Wallis* (a), the spreading out seed thin was held to be some evidence of acceptance.

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Welsby (with whom was *Prideaux*), for the defendant.—By the 17th section of the Statute of Frauds, no verbal contract for the sale of any goods, &c., for the price of 10l. sterling or upwards, shall be allowed to be good, unless the buyer shall *accept part of the goods so sold and actually receive the same*, &c. Therefore, in order to satisfy the statute, there must be both an *acceptance* and a *receipt*. [*Crompton, J.*—I have sometimes doubted whether there is much distinction between “receipt” and “acceptance.”] There must be an *actual receipt*, just as if the word “accept” was struck out. It is a good test, whether there has been a receipt of the goods, to inquire whether the seller’s right of lien remains; whether the character in which the seller holds the goods is so changed as to divest his right of lien. [*Cockburn, C. J.*—That is only another way of putting the question, whether he has parted with the possession. *Byles, J.*—In the present case the plaintiff would have had no answer if he had been sued in trover. He had no lien, because the goods were sold upon a credit of six months.] On the expiration of the credit, the goods remaining in the possession of the seller, the lien revived: *New v. Swain* (b). [*Williams, J.*—However that may be, there was a period

(a) 5 E. & B. 21.

(b) Dan. & Lloyd, p. 193.

Crompton, J., observed that this case is referred to without com-

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when the plaintiffs had not a lien, and if the statute was once satisfied the subsequent revival of the lien cannot affect the present question.] Though in bond, the goods were in the vendor's own warehouse. [*Byles, J.*—The warehouse is one of which the plaintiffs kept one key and the officer of the Customs another. It was proved that "after the entry" in the book the plaintiffs "had no power of getting the goods out."] The entry appears to have been made without the knowledge of the defendant. To constitute a receipt and acceptance within the statute, it is not enough that the purchaser has exercised some act of dominion over the goods. In *Carter v. Toussaint (a)*, a race horse was sold by verbal contract, but no time was fixed for the payment of the price. It was to remain with the vendors for twenty days without any charge to the vendee. At the expiration of that time the horse was fired and sent to Kimpton Park, for the purpose of being turned out to grass there, by the direction of the vendee, and by his desire was entered as the horse of one of the vendors; it was held that there was no acceptance of the horse within the statute by the vendee. *Tempest v. Fitzgerald (b)* is to the same effect [*Cockburn, C. J.*—*Carter v. Toussaint* has always appeared to me a startling case. *Williams, J.*—It proceeds on the ground that the seller had a lien; here the plaintiffs had none.] There can be no acceptance where the purchaser retains the right of objecting to the goods as not according to contract. That appears from *Howe v. Palmer (c)* and *Hunt v. Hecht (d)*. [*Crompton, J.*—Say rather—until he has had an opportunity of examining the goods, unless he has

ment in Addison on Contracts, p. 236. 1120, and Cross on Lien, p. 328. *Byles, J.*, said that its authority is questioned in Parsons on Contracts, p. 441. See also Blackburn on the Contract of

Sale, p. 324.

(a) 5 B. & Ald. 855.

(b) 3 B. & Ald. 680.

(c) 3 B. & Ald. 321.

(d) 8 Exch. 814.

waived examining them. *Byles, J.*—There was some evidence that the defendant agreed that the plaintiffs should hold the goods as warehouse-keepers, because after six months the plaintiffs were to be at liberty to charge rent.] In *Tempest v. Fitzgerald (a)*, after the contract the purchaser rode the horse and asked the vendor to keep it for him for a week. [*Crompton, J.*—The plaintiffs are much in the same position as if they had not been vendors, but mere warehousemen with whom a delivery order had been lodged (*b*).]

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Cole, in reply.—The plaintiffs have done all in their power to transfer the goods to the defendant. *Marvin v. Wallis (c)* seems to overrule *Carter v. Toussaint (d)* and *Tempest v. Fitzgerald (a)*. In that case there was the same apparent possession throughout, but the evidence shewed that the character in which the seller held the horse was changed. It shews that it is immaterial whether the seller retained any lien or not. The invoice conveyed to the defendant an intimation that the goods were warehoused for him.

COCKBURN, C. J.—We are all of opinion that the judgment of the Court below must be reversed, and the rule made absolute to enter a verdict for the plaintiffs. The question for us is, not how the jury would have found if it had been left to them, but, whether there was *any evidence of an acceptance and receipt* of the goods to satisfy the statute. I think that those terms are equivalent, and in my opinion there was such evidence. It appears that the defendant had entered into a contract with the plaintiffs' traveller to buy the goods, and he was to have a right to take them whenever he thought fit. In the mean time the goods were to remain in the warehouse of the plaintiffs

(a) 3 B. & Ald. 680.

(c) 6 E. & B. 726.

(b) *Furina v. Home*, 16 M. &

(d) 5 B. & Ald. 855.

W. 119, was referred to.

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for six months without payment, and afterwards subject to the payment of rent. The plaintiffs had a bonded warehouse in which they kept not only their own goods but those of other people. The plaintiffs appropriated particular goods to the defendant, and sent him an invoice specifying the goods so appropriated. Some time after this the defendant finding that it did not suit his convenience to keep the goods, proposed to the plaintiffs' traveller to take them back, and wrote to the plaintiffs suggesting that they should do so.—The question is, whether these facts amount to evidence of a constructive acceptance of the goods by the defendant. The important particular which has existed in several of the cases, viz., a lien on the part of the seller, which imports a right of possession incompatible with the possession of the purchaser, did not exist here. The goods were sold on credit, and it is incontestable that during six months the buyer might have claimed these specific goods. The first point then is whether, upon these facts, the possession which the seller retained was a possession by virtue of their original property, or as bailees of the buyer. I think there was evidence that the possession of the plaintiffs, which had originally been as owners and sellers, had been converted into a possession by them as bailees for the buyer; for, as soon as the goods had been specifically appropriated, the defendant, by virtue of his right as purchaser, evidenced by the terms of the invoice, availed himself of his right by having the goods warehoused in the general warehouse of the sellers, and by requesting the sellers to take back the goods, and failing that to resell them for him. Under the contract he was entitled to have the goods warehoused for a certain period free of charge and after that at a rent; and he dealt with the goods as if they had been warehoused for him. This was a construc-

tive possession in the buyer, and a constructive acceptance of the goods by him. It is unnecessary to consider whether, if the goods had not been according to the contract, the defendant might have repudiated them; or whether the case falls within the rule, that where a person chooses to accept goods without exercising his right to inspect them he waives his right to reject them, and must be taken to have accepted them without examination. The defendant was content that the goods should remain in the plaintiffs' warehouse till it suited him to deal with them as owner. Therefore that difficulty does not arise. A buyer may well waive his right to examine goods and accept them, trusting to his remedy by action if they turn out not according to contract. I am clearly of opinion that there was evidence for the jury; and, that being so, according to the arrangement at nisi prius, the verdict must be entered for the plaintiffs.

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CROMPTON, J.—I am of the same opinion. The only question in the Court below was whether there was any evidence to go to the jury in support of the plaintiffs' case. We do not differ from the Court of Exchequer except in thinking that there was some evidence of the plaintiffs' character being changed from that of seller to that of warehousekeeper. I take it to be clear that where goods are left by a buyer in the hands of the seller, who is also a warehouse-keeper or livery stable keeper, there may be a change in the character in which he holds the goods so as to make him the agent for the buyer. Here I think that there was evidence to shew that the defendant had admitted that the goods had become his, and remained in the plaintiffs' hands as warehouse-keepers. After that I think he could not have rejected them, though he might have had a remedy by action for damages if they were not according

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to contract. I think it is settled by the cases, that where the goods are left by the purchaser with the seller his character may be changed; and that where he becomes the bailee for the purchaser the statute is satisfied. In *Farin v. Home* (a), it was held that the mere giving of a transfer order for the goods was not sufficient, because they were held by a warehouse-keeper as agent for the seller; but where a delivery order is lodged and attorned to by the bailee he holds for the buyer, and the Statute of Frauds is out of the question. The only peculiarity of this case is that the same person was both seller and warehouse keeper. In such case, in order to satisfy the statute, it is necessary that there should be some evidence of a change in the character in which the plaintiffs held the goods. Now it is impossible to say that there was not some evidence to shew that the goods were in the hands of the plaintiffs as warehouse-keepers. The defendant made statements and wrote letters which shew that he acquiesced in the plaintiffs holding the goods as his agents. Particular casks were appropriated to the defendant by the invoice. The defendant kept the invoice and may be presumed to have assented to the terms of it. The invoice states that the goods were to remain "free for six months." This shews that the plaintiffs would keep the goods as warehouse-keepers free of charge for a certain time. It may therefore be inferred that the defendant knew that the plaintiffs were warehouse-keepers, and assented to their keeping the goods in that capacity for him. When applied to for payment he asks what the plaintiffs will give him for the rum. That is strong evidence of acceptance. When this is taken in connection with the entries in the rum and brandy books, and the proof that after that entry the plaintiffs could not get out the goods, there is evidence of a change of cha-

(a) 16 M. & W. 119, and see *Bentall v. Burn*, 3 B. & C. 423.



racter. After that I think that the defendants could not say that these goods did not pass to them, though they might have brought an action if they were not according to contract.

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WILLIAMS, J., BYLES, J., and KEATING, J., concurred.

Rule absolute to enter verdict for  
 the plaintiffs.

## IN THE EXCHEQUER CHAMBER.

*(Appeal from the Court of Exchequer.)*

JULIA TREW and GARDNER HIORNS, Executrix and Executor  
 of FREDERICK HIORNS, deceased, v. THE RAILWAY  
 PASSENGERS' ASSURANCE COMPANY. May 14.

**T**HIS was an appeal against the judgment of the Court of Exchequer in discharging a rule calling on the defendant to shew cause why the nonsuit should not be set aside and a new trial had. The pleadings, policy of assurance H. effected with the defendants a policy of assurance, whereby they agreed that if he should  
 sustain any injury caused by accident or violence, within the meaning of that policy and the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the defendants should be subject and liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon H. went to Brighton by railway, having a ticket which entitled him to return by it on the following Monday. About seven o'clock on Monday evening he left his lodgings, having expressed his intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, and about six weeks afterwards a body was washed ashore on the Essex coast, which his brother and some acquaintances deposed at the inquest was his body, but the jury found that it was the body of a person unknown.—*Held*, in the Exchequer Chamber: First, that assuming H. died from drowning, that was a death by "accident" within the meaning of the policy. Secondly, that it was a question for the jury whether H. died from the action of the water or from natural causes.



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and facts sufficiently appear in the report of the case in the Court below.—(5 H. & N. 211.)

The questions for the decision of the Court of Appeal were:—First, whether, assuming the said F. Hiorns to have been drowned at Brighton on the evening of the 15th of September, 1856, and that his death was not caused by suicide, either felonious or otherwise, or by his wilful act in exposing himself to unnecessary danger or peril, or while he was in a state of intoxication, the plaintiffs are entitled to recover in this action.

Secondly, whether there was any evidence proper to be submitted to the jury, that the said F. Hiorns was drowned.

If the Court should be of opinion in the affirmative on both questions, then the nonsuit to be set aside and a new trial had. If the Court should be of opinion in the negative on either of the said questions, then the nonsuit to stand.

*G. Francis*, for the plaintiffs.—First, there was evidence that the deceased was drowned whilst bathing. In the Court below *Martin*, B., said:—"I am of opinion that the rule ought to be discharged; and I am of that opinion, on the assumption that there was evidence for the jury, that the person assured died whilst bathing." *Watson*, B., was of opinion that, looking at all the circumstances, there was some evidence for the jury that the deceased was drowned. Then secondly, is drowning an accident within the terms of the policy? The policy provides that, "if at any time during his life, &c., the assured shall sustain any injury caused by accident or violence within the meaning of this policy and the conditions hereto, and if the assured shall die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the Company shall be subject and liable to pay the full sum



hereby assured to the legal representatives or assigns of the assured," &c. : "Provided that no claim shall be made under this policy by the assured in respect of any injury, unless the same shall be caused by some outward and visible means of which satisfactory proof can be furnished to the directors."

Here the assured died from injury resulting from accident and caused by some outward and visible means. In Taylor's Medical Jurisprudence, p. 721, 6th ed., it is said:—"No doubt now exists among physiologists that death by drowning is due to *apnœa* or suffocation, in which condition breathing is arrested, and the blood is at first circulated in a state unfitted to support animal life, and sooner or later its circulation through the minute vessels of the lungs is wholly arrested; thus producing the state of *asphyxia*." Assuming that the deceased was drowned, his death was not caused by natural disease. [*Cockburn*, C. J.—That would apply to cramp; but suppose he died of apoplexy whilst in the water. *Crompton*, J.—If his death was caused by cramp preventing him from swimming, then he died from injury caused by accident; but death by apoplexy is a death from natural disease. The Court below evidently considered that the question before them was, whether the deceased died from drowning or apoplexy.] If drowning be held a death from natural disease, all cases of drowning would be excluded from this policy. This subject was considered in *Sinclair v. The Maritime Passengers Assurance Company*(a), where *Cockburn*, C. J., in delivering the judgment of the Court said: "It is difficult to define the term 'Accident' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from natural causes, such as shall be of universal application. At the same time we think we may safely assume, that in the term 'Accident,' as so used, some violence, casualty, or

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(a) 7 Jur. N. S. 367.



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vis major is necessarily involved." The fact that the deceased died in the water was evidence for the jury that death was caused by a vis major. If he had caught a cold from which he ultimately died, that would not have been within the terms of this policy. *The Midland Railway Company*, appts., *Bromley*, resp. (a), was relied upon in the Court below; but there *Crowder, J.*, in delivering judgment said: "Where the evidence is quite as consistent with one view as with the other, the party upon whom the onus lies fails to make out his case."

*Lush* (with whom was *Phipson*), for the defendant. First, death by drowning is not death by "Accident" within the terms of this policy. The policy was intended to compensate the assured, either where injury short of death was caused by accident or violence, or where death resulted from such injury. But the injury or death must be caused by some outward and visible means capable of satisfactory proof. It is true that if a person walks into the water and is drowned, that is in one sense a death from accident because it was uncertain whether the event would occur; but it is no more a death from accident, within the terms of this policy, than a death from sun-stroke. It may be different if a sailor falls overboard and is drowned. That is the case of a person voluntarily going into an element which might or might not cause his death: it is like the case of a person who exposes himself to the influence of tropical sun. But the policy only protects the assured against injury, or death arising from injury caused by violence. [*Cockburn, C. J.*—Suppose a person rushed into a house whilst it was on fire to save his child, and was burnt to death, would that be death from "Accident" within the meaning of this policy?] Since the act of entering the

(a) 17 C. B. 372.



house was voluntary, the death could not be said to be accidental. In the case of *Sinclair v. The Maritime Passengers Assurance Company* (a), the assurance was against "any personal injury from, or by reason, or in consequence of any accident." *Cockburn, C. J.*, in delivering the judgment of the Court, said: "It is true, that in one sense disease or death through the direct effect of a known natural cause, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes."—Secondly, assuming that death from drowning is within the terms of this policy, there is no evidence that the assured died from drowning. His death may have been caused by apoplexy or cramp in the heart. [*Cockburn, C. J.*—The probability is greater that he died from drowning than from other causes.] By the terms of this policy it is not enough that, probably, the assured died from drowning, but the nature of the death must appear. [*Crompton, J.*—The same argument would apply to the case of a person who fell overboard from a ship.] There must be evidence from which a jury may reasonably and properly conclude that the assured died from drowning: *Toomey v. The London, Brighton and South Coast Railway Company* (b).—He then argued that there was no evidence that the assured was dead.

*Francis* in reply.—It appears by Taylor's Medical Jurisprudence, p. 725, 6th ed., that where death occurs in the water, it is in very few instances caused by apoplexy. The policy must be construed most strictly against the assurers. The proviso that "No claim shall be made under this po-

(a) 7 Jur. N. S. 367.

(b) 3 C. B., N. S. 146.

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policy by the assured in respect of any injury, unless the same shall be caused by some outward and visible means, of which satisfactory proof can be furnished to the directors," not applicable to cases of personal injury, not death; and therefore not apply to a claim made by the representatives of a deceased person.

COCKBURN, C. J.—We are all of opinion that this note was wrong, and that the judgment of the Court of Exchequer, in refusing to set it aside, was erroneous. It is that, assuming the deceased died by drowning, drowning is not one of the cases comprehended in this policy of assurance. Mr. *Lush* ingeniously argued that the policy applies to cases where from accident or violence some injury occurs from which death may or may not ensue; and if death ensues within three months, the sum assured is payable. But he contended, in effect, that where the cause of death produces immediate death without the intervention of external injury, the policy does not apply; and when death from the action of the water there is no external injury, death by the action of the water is not within the meaning of this policy. That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind, in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to those policies a construction which would defeat the protection of the assured in a large class of cases. We are therefore of opinion that, if there was evidence before the jury that the deceased died by drowning, that was death by accident within the terms of this policy.



The next question is whether there was evidence for the jury that the assured met with his death by drowning. It appears that he went to Brighton for recreation, and there is no reason to suppose that he intended to commit suicide. He left his lodgings for the purpose of bathing, and his clothes were found by the water-side, but he himself was not afterwards seen. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves. There was some evidence that this was the body of the assured, and, assuming that it was, the question ought to have been submitted to the jury whether he met with his death by drowning. If they found that he died in the water, they might reasonably presume that he died from drowning. It is true, that death occurs in the water in some instances from natural causes, as apoplexy or cramp in the heart—but such cases are rare and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water or natural causes. If they are of opinion that he died from the action of the water causing asphyxia, that is a death from external violence within the meaning of this policy,—whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth. For these reasons we think that there must be a new trial.

Award of trial de novo.

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## IN THE EXCHEQUER CHAMBER.

*(Error from the Court of Exchequer.)*

May 15.

SWINFEN v. BACON.

B., who held lands as tenant from year to year under S., after the death of S. took the same with other lands at an increased rent from the devisee of S. The heir-at-law disputed the will. The devisee gave to B. notice to quit. B., acting under a bona fide belief that the heir-at-law was entitled, refused to give up possession of the land to the devisee,—  
*Held*, by the Court of Exchequer Chamber (affirming the decision of the Court of Exchequer), that B. was not liable to pay double rent under the 4 Geo. 2, c. 28, which applies only when the tenant holds over though conscious that he has no right to retain possession.

**T**HIS was a proceeding in error upon the judgment of the Court of Exchequer on a special case, reported at p. 184.

*Kennedy*, argued for the plaintiff (a).—In order to render a tenant who holds over after the expiration of his tenancy and after demand made and notice in writing given of delivering up possession by his landlord, liable for double value under the 4 Geo. 2, c. 28, s. 1, it is not necessary to shew that he held over *fraudulently*. The preamble states the object of the act, “for securing to lessors and landowners their just rights, and to prevent frauds frequently committed by tenants.” With that object, certain acts are positively prohibited under penalties. If it had been intended that the enacting part should apply to those cases only where the tenant is actually guilty of fraud, it would have been so expressed. Holding over after an act of a dangerous character which may lead to fraud

(a) Before *Cockburn*, C. J., *J.*, *Byles*, J., *Hill*, J., and *Kent*, J., *Williams*, J., *Crompton*, J., *Willes*, J., and *ing*, J.



Under the old practice in the action of ejectment, as it existed at the time of the passing of the 4 Geo. 2, c. 28, several terms might have elapsed before the landlord could obtain possession. A similar system of legislation is found in other statutes passed about the time when the 4 Geo. 2, c. 28 became law. For instance, the 9 Geo. 2, c. 36, s. 1; 15 Geo. 2, c. 30, and 19 Geo. 2, c. 37, contain positive prohibitions of acts which might be harmless in themselves, on account of their mischievous tendency. Full effect is given to the word "wilfully" by the interpretation now suggested. If that word had been omitted a tenant would be liable for holding over even though he might not know that his term had expired. "Wilfully" means no more than intentionally. [*Cockburn*, C. J.—Does it not imply an intention to hold over and resist the known right of another?] Suppose a landlord gave notice to his tenant to quit at Christmas, and the tenant believed that his term commenced at Lady Day, and that the notice to quit was invalid; if the tenant held over *bonâ fide*, which would be a question for the jury, he would not be liable for double value under this statute. But the question when a tenancy commences is one of fact, and often difficult of solution. Again, suppose a man holding under a lease for lives had reason to believe that a life had not dropped, and held over *bonâ fide*, he would not be liable. [*Crompton*, J.—Why may not a tenant lawfully be in doubt to whom he is bound to give up possession as landlord?] The word "wilfully" must be construed with reference to the law of landlord and tenant. [*Cockburn*, C. J.—If a person is to be visited with a penalty for doing a certain act, *viz.*, holding over with intent to keep out his landlord, it must be shewn that he intended to do the act. Here the defendant did not intend to keep out his landlord. There was no *mens rea*.] The defendant would have had no

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defence to an ejectment; he was estopped from denying the plaintiff's title: *Doe d. Marlow v. Wiggins* (a), 2 Smith's Leading Cases, 654, and he knew that his title under her had expired. [Crompton, J.—If you could shew that the defendant had read Smith's Leading Cases, and knew what an estoppel was, your argument might be better founded.] Where two parties are severally claiming as landlords, a tenant may protect himself by going to a Court of equity; but he must be neutral. Here the defendant was the partisan of a person whose claims he was bound to resist: 11 Geo. 2, c. 19, ss. 11, 12.

*Manisty* (with whom was *Macnamara*), appeared for the defendant; but was not called upon.

COCKBURN, C. J.—We are all of opinion that the judgment of the Court below must be affirmed. Ever since the case of *Wright v. Smith* (b), decided more than half a century ago, the interpretation put upon the 4 Geo. 2, c. 28, has been that when a person holds over not contumaciously as against the person entitled to the possession, but under a bonâ fide belief that he has a right to do so, the statute does not apply. I think it would be very mischievous, as well as contrary to the true construction of the Act, if we were to hold otherwise, for I am strongly of opinion that “wilfully” holding over applies only when a tenant holds over in the absence of a bonâ fide belief that he is justified in doing so. In the present case, the defendant, who held under the testator as tenant from year to year, accepted a fresh grant from the devisee; after that he found the heir-at-law disputing the will, and was in doubt whether he was tenant to the heir-at-law or the devisee, not knowing whether the devisee had power to grant him a fresh term or not, but

(a) 4 Q. B. 367.

(b) 5 Esp. 203. 215.



bonâ fide believing that the grant was inoperative. It is in fact admitted that the defendant acted under a bonâ fide belief that Captain Swinfen had the better title, and that the devisee had no title. We do not think that this is a case to which the statute was intended to apply. It has been long held, and we think rightly, that the statute applies only to the case of a tenant who holds over though he is conscious that he has no right to retain possession.

Judgment affirmed.

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## IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

CLARKE and Others, Representatives of DICKENSON,  
deceased, v. WRIGHT.

Feb. 8.

THIS was an appeal by the defendant against the decision of the Court of Exchequer in discharging a rule to enter a

D., a widow,  
being pos-  
sessed of cer-  
tain real pro-

erty, by settlement in contemplation of her marriage, dated the 17th May, 1830, reciting that, upon the treaty for the marriage, it was agreed that her property should be appointed, released and conveyed as thereafter mentioned, limited the property to trustees in trust for herself for life, with remainder, as to part, to her husband for life, remainder to the use of her illegitimate son, the plaintiff, in fee, and as to the residue, to the plaintiff in fee in case he should attain the age of twenty-one years, &c. She and her husband subsequently mortgaged the property. In ejectment by the plaintiff against a person claiming title under the mortgagee, it was proved that in October, 1830, the husband and wife let the property to T., and received the rents of it for some years. The plaintiff gave secondary evidence of the above settlement, which was afterwards put in by the defendant.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer): First, that the limitation in the marriage settlement to the plaintiff, though a bastard, was not fraudulent and void as against the mortgagee by the 27 Eliz. c. 4. *Dissentiente Williams, J.*

*Per Cockburn, C. J., and Wightman, J.*—Because although the limitation in the marriage settlement to the illegitimate son of the wife, being the settlor, could not be deemed within the consideration of the marriage and was therefore voluntary, yet the case came within the principle of the exception engrafted upon the rule, viz. that a provision in a marriage settlement *in favour of existing children* cannot be deemed *fraudulent* within the statute 27 Eliz. c. 4.

*Per Blackburn, J.*—Because the limitation so interfered with those which would naturally be made in favour of the husband, wife and issue, that it must be presumed to have been agreed upon by all parties as part of the marriage bargain that the estate should be so settled.

Secondly: that there was evidence of the seisin of D. at the time of the execution of the settlement: *Per totam Curiam.*



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nonsuit, or for a new trial. It appeared that the plaintiff in the first instance gave secondary evidence of the settlement which was afterwards put in by the defendant. In other respects the facts of the case fully appear in the report, 5 H. & N. 401. W. T. Dickenson, the plaintiff, having died since the trial, the above mentioned claimants were made parties by suggestion.

*Mellor* (*Field* with him), argued for the defendant (*a*).—The first question is whether a limitation in a marriage settlement to the use of an illegitimate son of the settlor, is voluntary, and therefore fraudulent and void, by the 27 Eliz. c. 4, as against a mortgagee who is a purchaser, within the meaning of that Act. In order to render a settlement void as against creditors, it is necessary to shew that it was not bonâ fide, or that the settlor was in debt at the time he made it. Therefore a settlement may be good as against a creditor, though not good as against a purchaser for valuable consideration. For a long time it was thought that the question whether a settlement, in consideration of natural love and affection, was void as against a subsequent purchaser for valuable consideration, depended upon whether the purchaser had notice of the prior settlement; but it is now established that it is immaterial whether the purchaser had notice, because, as against him, the law implies fraud. The authorities on that subject are reviewed by Lord *Ellenborough* in *Doe d. Otley v. Manning* (*b*). The law as there laid down is commented on in a note to *Shep. Touch*, by *Atherley*, p. 64, 8 ed., where it is said:—"Upon the whole, there can be no doubt but the Act of the 27 Eliz. avoids voluntary conveyances, as such, against subsequent purchasers for a valuable consideration. But it only does this, it is

(a) In last Michaelmas Vacation, Dec. 1 & 3. Before *Cockburn*, C. J., *Wightman*, J., *Williams*, J.,

*Willes*, J., and *Blackburn*, J.  
 (b) 9 East, 59.



apprehended, where the purchaser has *no notice* of the voluntary settlement." Here, however, the mortgagee had no notice of the settlement. [*Willes, J.*, referred to *Currie v. Nind (a)*.] In *Taylor v. Jones (b)* a post-nuptial settlement was held void as to creditors. *Fortescue, M. R.*, there said:—"I must decree for the plaintiffs, the creditors, against the wife and children; for though I have always a great compassion for wife and children, yet, on the other side it is possible, if creditors should not have their debts, their wives and children may be reduced to want." In this case, if Mrs. Dickenson could not, prior to her marriage, have made a settlement in favour of her illegitimate son, which would be valid as against a subsequent purchaser for valuable consideration, what additional right did she acquire by her marriage? Marriage is a valuable consideration, but it is a consideration limited to the objects of the marriage. In Sugden's Vend. and Purch. p. 589, 13 ed., it is said:—"The marriage consideration runs through the whole settlement as far as it relates to the husband and wife and issue; but the marriage consideration will not extend to remainders, to collateral relations, so as to support them against a subsequent sale to a *bonâ fide* purchaser." However, such a remainder, when after a *vested* estate tail, has been supported, on the ground that the intent of the settlor could not have been fraudulent, since he interposed a limitation which might prevent the ultimate remainder from taking effect: *White v. Stringer (c)*. An illegitimate son is a stranger, and consequently the marriage consideration does not extend to him. In *Osgood v. Strobe (d)* Lord *Macclesfield* first laid down the rule that the marriage consideration supports only the limitation to the husband and wife and their issue, and that a remainder in fee to a

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(a) 1 Myl. &amp; C. 17.

(c) 2 Lev. 105.

(b) 2 Atk. 600.

(d) 2 P. Wms. 245; 10 Mod. 533.



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collateral relation is voluntary. There is, however, a dictum of Lord *Eldon*, in *Pulvertoft v. Pulvertoft* (a), that if there be father, tenant for life, with remainder to his son in tail, they may agree, upon the marriage of the son, to settle, not only upon his issue, but upon collaterals, and that the limitations to the latter, though not within the marriage consideration, may be supported, as being within the contract between the father and son. In *Roe d. Hamerton v. Mitton* (b) a limitation to collaterals, in an ante-nuptial settlement was held not to be voluntary and void as against a purchaser for valuable consideration. But there, as observed by Lord *Campbell*, C. J., in delivering the judgment of the Court in *Tarleton v. Liddell* (c), the party conveying and settling the land took a benefit, and had a good consideration, in having part of his lands, of which he was seised in fee, discharged from an annuity. Other cases are collected in *Roberts on Voluntary Conveyances*, sect. 7, p. 120. [*Cockburn*, C. J.—Suppose two persons about to marry, one of whom has children by a former marriage, and that they agree by articles to make a provision for those children, would not that be valid? If so, why should not the same law apply to illegitimate children?] The settlement was made before the passing of the Poor Law Amendment Act, 4 & 5 Wm. 4, c. 76, s. 57, by which the mother of an illegitimate child, so long as she remains unmarried, is bound to maintain it as part of her family until it attains the age of sixteen. *Newstead v. Scarles* (d) decided that a settlement by a widow, previously to her second marriage, of her estate on the children of the first marriage, is not fraudulent and void as against purchaser or creditors. That case is cited in *Sugden's Vend. and Purch.*, p. 589, 13th ed., but not approved of. It is also reviewed in *Roberts on Vo-*

(a) 18 Ves. 84. 92.

(b) 2 Wils. K.B. 356.

(c) 17 Q. B. 390. 415.

(d) 1 Atk. 265.



luntary Conveyances, p. 363, where the author says, "At most, perhaps, when clearly understood, it is an isolated case." *Doe d. Otley v. Manning* (a) has settled the construction of the 27 Eliz. c. 4. In *Chapman v. Emery* (b), where Lord *Mansfield* held, that a settlement by a man after marriage on his wife and children was void as against a subsequent mortgagee, he said: "Where a woman, about to marry a second husband, makes a settlement of her estate upon the children by her first husband, such settlement has been held good." But it does not appear that he approved of that decision. In *Doe d. Otley v. Manning* (a), Lord *Ellenborough* said: "Much property has, no doubt, been purchased, and many conveyances settled upon the ground of its having been so repeatedly held, that a voluntary conveyance is fraudulent, as such, within the statute 27 Eliz." *Johnson v. Legard* (c) is also an authority that a limitation in a marriage settlement in favour of collateral relations is void as against a subsequent purchaser with notice. [*Cockburn*, C. J.—In *Clayton v. The Earl of Wilton* (d), a limitation in favour of the issue of a second marriage by the settlor was held good as against a subsequent purchaser for valuable consideration.] There is a notice of that case in *Sugd. Vend. and Purch.*, p. 589, n, 13th ed., where it is said:—"It is observable, that in order to support the limitations to the daughters of the first marriage, it was necessary to support the remainders to the sons of the second marriage. That was of itself a sufficient ground to support the remainder. It has, on the same principle, been considered that an estate to a stranger may be supported, under a covenant to stand seised, if required to give effect to subsequent limitations within the consideration." So in *Shep. Touch.* 513, it is said:—"If I covenant with B., in consideration of the marriage of my son with the daughter

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(a) 9 East, 59.

(b) 1 Cowp. 278. 280.

(c) 6 M. &amp; Sel. 60.

(d) 6 M. &amp; Sel. 67, n.



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of B., to stand seised to the use of R. (a stranger) for life, and after to the use of my son and his wife in tail ; in this case the use shall rise to R. albeit he be a stranger ; and that for the supportance of the remainder, which cannot be without a particular estate." In the case of *St. Saviour's in Southwark* (a) it was held, "that if a man doth, in consideration that his son shall marry the daughter of B., covenant to stand seised to the use of his son for life, and after to the use of other his sons, in reversion or remainder, these uses thus limited in remainder are fraudulent against a purchaser though these first be upon good consideration, viz. for marriage." That case is commented on in Sugden's *Vend. and Purch.*, p. 557, 5th ed. Also in 2 *Roll. Abridg. "Uses"* (L) pl. 5, and *Viner's Abridg. "Uses"* (L) pl. 5, it is said :—"If a man, in consideration that B. shall marry his daughter, covenants to stand seised to the use of B. and his daughter, the remainder to C. ; this is a void remainder to C., because he is a stranger to the consideration." *Bellingham v. Wentworth* (b), *Sutton v. Chetwynd* (c), *Cormick v. Trapaud* (d), are also authorities that a limitation in a marriage settlement in favour of a stranger to the consideration is void. In *Johnson v. Legard* (e), Lord Eldon expressed an opinion that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary. [*Wightman*, J.—The settlement recites that upon the treaty for the contemplated marriage it was agreed that the estate should be conveyed as thereafter mentioned ; therefore it would appear that in consequence of the treaty and upon the faith of the settlement the marriage took place.] It must be admitted that the brothers of the settlor are strangers to the consideration of the marriage :

(a) Lane, 21.

(b) 1 Chan. Ca. 243.

(c) 3 Meriv. 249.

(d) 6 Dow. 60. 86.

(e) Tur. & Russ. 281.



*Cotterell v. Homer* (a). [*Blackburn, J.*—In that case there was no discussion as to whether the settlement was voluntary or not, or as to what makes a settlement voluntary; it was merely held that that particular settlement was voluntary.] In *Staplehill v. Bully* (b) there is a dictum to the same effect. In *Jenkins v. Keymis* (c), by settlement made on the marriage of C. and B., certain estates were limited to the use of C. for life, remainder to the use of the heirs of the body of C. and B., remainder to the heirs of the body of C., with remainders over; and it was held that the consideration of the marriage extended to the children of the second marriage of C. But Lord *Hale* appears to have thought that the consideration of the marriage might extend to all the estates in the settlement (d), which is clearly contrary to the later cases. In *White v. Stringer* (e) there was a covenant in consideration of the marriage of the first son to settle to him in tail, remainder to the second son; and it was held that the limitation to the second son was not voluntary and fraudulent; but that was because the limitation, being after the determination of a vested estate tail which might endure for ever, could not be intended to deceive a purchaser; and, secondly, the purchaser had collateral security by deed against the remainder. A bastard is a mere stranger: he is not considered in law as the child of his reputed parent. [*Willes, J.*—Is not that too wide a proposition? For some purposes he is considered as next in blood, as in the case of marriage within the prohibited degrees. So, in the doctrine of *bastard eigné* and *mulier puisné*.] He is not so connected with the parent as to come within the marriage consideration. The marriage consideration is only valuable quoad the parties to the mar-

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(a) 13 Sim. 506.

Hardres, 395; 1 Chan. Ca. 103.

(b) Prec. Chan. 224.

(d) 1 Lev. 152.

(c) 1 Lev. 150. 237. See also

(e) 2 Lev. 105.



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riage, or the issue of the marriage. If the children former or subsequent marriage take as purchasers, there is no reason why collaterals should not. [*Blackburn*, In the cases which have been referred to there was no evidence that it was any part of the bargain that there should be a settlement for the use of collaterals. On which side is the onus of proof? (a). *Williams, J.*—In *Johnson v. Legard Giffard* argued that it could not be contended that the marriage was the inducement for a limitation to the benefit of the settlor.] In *Johnson v. Legard* the only question was whether collaterals took as purchasers; there is no authority in that case to support the distinction contended for on the other side. In Littleton, sect. 188, it is said, “No man may be a villein unless he will acknowledge himself to be a villein in a Court of record. He is in law quasi non filius.” In Co. Litt. 123, it is laid down that “A bastard is not a child within the statute of Wills, 32 H. 8, c. 1. *Gerrarde, q. t., v. Worsley (c)*, it was held, that the consideration of natural affection will not raise a use to a bastard. In 4 Vin. Ab. Bastard (C.), and 22 Vin. Ab. Uses pl. 4, 5, the same doctrine is laid down. In *Furs v. Robinson (d)* the Court of Chancery refused to set aside the want of a surrender on behalf of an illegitimate child. In *Hollway v. Millard (e)* a voluntary settlement by an indebted person, in favour of his illegitimate child, was upheld as against subsequent creditors; but the Vice Chancellor held that the illegitimate child could not be considered other than as a stranger; and the decision is rested on the ground that the word “voluntary” is not to be found in the statute 13 Eliz. c. 5.

(a) On this point *Currie v. Nind*, 1 Myl. & Cr. 17, and *Kewich v. Manning*, 1 De Gex, M. & G. 176, were referred to.

(b) 6 M. & Sel. 60. 64.

(c) 3 Dyer, 374, a.

(d) Prec. Chan. 475.

(e) 1 Madd. 414.



Lastly, the deeds were mere waste paper without proof of the previous seisin of Mary Dickenson. [*Blackburn, J.*—There was some evidence of Mary Dickenson's seisin at the end of the plaintiff's case. But at the end of the whole case, after the defendant had put in the settlement, there was ample evidence. *Willes, J.*—If a plaintiff proves that A. and B. received rents at a particular time he may shew from whom they had taken a conveyance.] The deed is a mere statement by Mary Dickenson, who is not shewn to have had an interest in the property when it was executed. A party is not bound by every recital in a deed, merely because he claims under one who executed it. [*Blackburn, J.*—The acts of ownership proved were *primâ facie* evidence of seisin in fee. The deed being put in shewed that the parties were not seised in fee, but only interested under the settlement.] The presumption is as to the *status quo*, not as to the *statu quo antè*. [*Cockburn, C. J.*—It is not necessary to prove a possession exactly contemporaneous with the execution of a deed. *Blackburn, J.*—Take the case of a lease which has subsisted for a hundred years, proof of possession and payment of rent under it would be *primâ facie* evidence of the seisin of the grantor.]

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*A. Wills*, for the plaintiff.—A bastard is not a mere stranger as regards the parent. It is true that a covenant to stand seised to the use of the bastard does not raise a use; but that is because a covenant to stand seised requires one of two particular considerations, viz., marriage or blood; and there might be a difficulty in saying that a bastard is related in blood. But he is recognised by the law as having a claim to be maintained by his parent, by the statute 18 Eliz. c. 3, s. 2. There is no obligation enforceable at common law on a parent to support even his legitimate



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children: *Mortimore v. Wright* (a). If there is a purchase in the name of an illegitimate child, it is deemed an advancement of the child, and the use does not result to the person who pays the money, as it would if the purchase were in the name of a stranger: Sugden's Vendors and Purchasers, p. 578, 13th ed.; Fearne's Posthumous Works, p. 327; 2 Fonblanque on Equity, p. 124; *Beckford v. Beckford* (b). The parent is under a legal as well as moral obligation to support his illegitimate as well as his legitimate children. Then, can a limitation in a marriage settlement to an existing illegitimate son of the mother be said to be voluntary and void, consistently with the authorities on this subject? According to the principle of *Jenkins v. Keymis* (c), it would seem that he is within the consideration of the marriage. In *Osgood v. Strode* (d), *Jenkins v. Keymis* is treated as an existing authority. [Blackburn, J.—One of the grounds of the decision in *Jenkins v. Keymis* as reported both by Levinz and Hardres, appears to have been that the Court could not import fraud into a special verdict which did not find it.] It has not been treated as depending upon that ground in any subsequent case. The decision in *Newstead v. Searles* (e), is rested by Lord Hardwicke, not upon any technical grounds, but upon the broad basis of public policy. [Blackburn, J.—Suppose, independently of any marriage, the wife had settled the property on her illegitimate son?] The marriage enabled her to make a binding settlement which she could not have done without it. There was a legal as well as a moral obligation on the mother to provide for the plaintiff. The concurrence of these obligations brings this case within the principle which was applied in *Newstead v. Searles* (e),

(a) 6 M. &amp; W. 482.

(b) Loft, 490.

(c) 1 Lev. 150.

(d) 2 P. Wms. 245.

(e) 1 Atk. 265.



and *Clayton v. Lord Wilton* (a), and distinguishes it from *Johnson v. Legard* (b). Here the wife in effect said to the intended husband "I will not marry unless you give up a certain interest, to which you would be entitled as tenant by the curtesy." Every presumption must be made in favour of the settlement: *Ex parte Vernon* (c). In *Kekewich v. Manning* (d), the Lord Justices were inclined to infer a consideration in favour of a collateral. Again, the limitation may be supported as purchased by the intended husband according to the suggestion in the Court below.—He also referred to *Pulvertoft v. Pulvertoft* (e), *Roe d. Hamerton v. Mitton* (f.)

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*Mellor*, in reply.—Sir *E. Sugden*, who argued the case of *Clayton v. The Earl of Wilton* (a), states the principle on which it was decided: Vendors and Purchasers, 13th ed., p. 589, n. [*Willes*, J., referred to *Scott v. Scott* (g).]

Cur. adv. vult.

The following judgments were now delivered.

BLACKBURN, J.—In this case the decision of the Court of Exchequer was appealed against upon two grounds. First, that there was no evidence fit to be submitted to the jury of title on the part of Mrs. Dickenson to convey the premises in question by the settlement made on her marriage with Mr. Doncaster, dated the 17th of May, 1830. This ground of appeal was disposed of on the argument; there was ample evidence, and the decision of the Court of Exchequer on this point was clearly right.

(a) 6 M. & Sel. 67, n; 3 Madd. 302.

(b) 6 M. & Sel. 60. On this point he also referred to Dart's Vendors and Purchasers, p. 469.

(c) 2 P. Wms. 549.

(d) 1 De Gex, M. & G. 176.

(e) 18 Ves. 84.

(f) 2 Wils. K. B. 356.

(g) 11 Ir. Eq. Rep. 487; 4 H. L. 1065.



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The second ground of appeal was, that the limitation that settlement in favour of the plaintiff was voluntary and void against the defendant, he being a purchaser for value. On this point the Court of Exchequer Chamber took time to consider.

On consideration, I have come to the conclusion that the limitations in question are not voluntary, and consequently that the decision of the Court of Exchequer ought to be affirmed.

We are bound by decided cases to hold that a settlement of real estate, if not made for a valuable consideration, is void against a subsequent purchaser, even with notice. Such a settlement is deemed voluntary, and therefore fraudulent and void, though made honestly and openly to provide for the settlor's wife and children: *Chapman v. Emery* (a) or his mother and younger brothers and sisters: *Doe v. Manning* (b); for no moral consideration, however strong, is sufficient to support a settlement against a purchaser. In the present case the plaintiff was the illegitimate son of the settlor, treated by her as if he were her legitimate son; and though, in my opinion, the moral obligation on her part to provide for him was as strong as if he had been her legitimate son, it was not stronger. The limitations, therefore, in his favour are, in my opinion, void as against the defendant, unless it can be shewn that they were made for valuable consideration.

No extraneous evidence was given for the plaintiff to shew that there was any valuable consideration, not expressed on the face of the deed in which the limitations in favour of the plaintiff are contained. We must say, on the construction of that deed alone, whether the limitations are voluntary or not.

It is a settlement made on the marriage of a woman, Mary Dickenson, who was seised of real estate in fee, with

(a) Cowp. 278. 280.

(b) 9 East, 59.



William Doncaster. She had no legitimate children. If no settlement at all had been made, the husband would, on the marriage, have become seised in right of his wife; during the coverture he would have had the chance of being tenant by the curtesy if there were issue of the marriage, and the issue of the marriage, if there had been any, would have been the heirs of the wife, and would, in the ordinary course of things, have inherited the estate. But, by the settlement which the husband, William Doncaster, executes for the purpose of testifying his assent to it, the estate is settled to the separate use of Mary Dickenson for life, remainder as to one part of the premises to William Doncaster, the husband, for life, with remainder to the plaintiff in fee, and as to the residue of the property, with remainder to the plaintiff in fee, in case he should attain the age of twenty-one, but if he should die under that age, unmarried and without issue, to such use as Mary Dickenson should by her will appoint, and, in default of appointment, to her in fee.

So that, by this settlement, the intended husband takes different interests in the landed property from that which he would otherwise have taken. As to the part which is settled, on him for life, he takes a greater interest than he otherwise would have taken; as to the residue, a smaller interest, inasmuch as he is not to have the chance of the tenancy by the curtesy; and he consents to a settlement by which the children of the marriage are totally deprived of the chance of the succession which they would otherwise have had. It seems to me that, though in general it may be supposed that on a marriage-treaty, after the interest of the intended husband and wife, and the issue of the marriage, is provided for, the remainder of the estate is left to be disposed of as the party to whom it would revert pleases; yet, when we find the interests of the husband, wife and issue so

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much affected by the settlement was agreed by all parties, as that the estate should be thus to marry the husband on the should be thus made, varying children of what would other that the husband agreed to make this settlement should be so notion comes to be, if a limitation not merely inserted in the making from its nature to have been the marriage bargain, is to be be considered as made for the marriage?

In the argument the possibility support the illegitimate son and wife was mentioned, and it was might have required his interest son, to prevent the possibility I merely notice this argument to it. I do not believe that was thought of, and I think the settlement would have been made

In my opinion the case would plaintiff had been some distant first husband, or an absolute had adopted and bred up as had Lord Justice *Knight Bruce* are to some extent adopted below in this case. I cannot to my mind. *In ea quæ fi jura*; and though doubtless it bridegroom might insist on his of the estate which would other

(a) 1 De Gex



his children for her illegitimate child, yet, in the ordinary course of things, it is to be presumed that the stipulation for such a provision originated with the wife, and was assented to by the husband with more or less reluctance. But, though this is so, it does not follow that there was no consideration for the limitations. The husband got the enjoyment of some part of the wife's property, which he could not have had if the marriage had not taken place. He may have got this on cheaper terms; he may have been allowed to take a larger portion of her personal estate than he would have been permitted to take if this settlement on the plaintiff had not been made; or he may have been allowed to keep free a greater portion of his own property than he would otherwise have done; and, in consideration of these substantial benefits to himself, he may have become a party to a contract for this limitation. I do not know that in this case these matters did occur, but it seems to me that, as on every marriage settlement there are, to use the language of Lord *Hardwicke*, reciprocal considerations between husband and wife, we ought not to hold a limitation which is not merely included in the marriage settlement, but appears from its nature to have been really one of the terms of the marriage bargain, voluntary.

The marriage bargain is like any other mutual agreement in which there are many terms,—the promise by the one party to be bound by all the terms is a consideration for the promise of the other party to be bound by all the terms, so that none of them are without consideration; though it would be quite possible that other matters mentioned at the same time were not made part of the terms of the bargain and were therefore without consideration. And it is forcibly observed in *Dart's Vendors and Purchasers*, p. 580, that in case of marriage the impossibility of restoring the consideration by replacing either party in their original *status* is a sufficient

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reason why full effect should be given to any arrangement that formed part of the equivalent for the change. It is true that the estate here belonged to the wife, and that it is presumably at her instance that the stipulation was inserted. But it seems to me that, when once it is shewn that the intended husband and wife bargained that part of what would otherwise have been the joint fund of the matrimonial firm, should on the marriage go in a particular way, it is immaterial whether it is part of what the husband would have brought in that is so settled, leaving the wife's contribution in the firm, or part of the wife's contribution that is so settled, leaving the husband's in the firm. It is equally part of the bargain, and so not voluntary.

There are some very sensible observations in Dart's Vendors and Purchasers, pp. 578 and 579, in which I thoroughly concur, and which I adopt as part of my judgment. It is there said:—"Unnecessary difficulty appears to have been thrown over the cases upon the subject by a confusion between the contract and the consideration for the contract; the common form of objection is, that collaterals are not within the consideration of the marriage (a). Now this expression is, it is submitted, scarcely accurate. If A. agreed with B. to pay him 10,000*l.* in consideration of his conveying his estate to the use of A. for life, with remainders over in favour of strangers, and the money were paid, and the conveyance executed accordingly, a question might arise whether the remaindermen took beneficially or in trust for A.; but subsequent purchasers from B. could hardly contend that the limitations in the settlement, *ultra* A.'s life estate, were void, upon the ground of the remaindermen not being within the consideration of the 10,000*l.* (b). In the case of a marriage settlement the important question seems to

(a) 18 Ves. 92.

(b) And see *Ford v. Stuart*, 15 Beav. 493. 499.



be, first, whether the collaterals were within the contract ; and secondly, whether, if so, there was a sufficient consideration for such a contract."

"Upon the first question, considered merely as one of principle, it is submitted that where the limitations over are in favour of collateral relations or connections not of the settlor but of the other contracting party (whether wife or husband), the settlement itself may be considered *primâ facie* evidence of such other party having stipulated for their insertion. So where, on a settlement of the intended wife's estate, the limitations over are in favour of her own collateral relations in derogation from the husband's marital right by survivorship (in case of personalty) or as tenant by the curtesy (in case of realty). Where, in any case other than that last referred to, the limitations over are in favour of the collateral relations or connections of the settlor, such presumption cannot so readily arise ; but it might be proved that the other party stipulated for their insertion. If such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary and void as against a subsequent *bonâ fide* purchaser."

Mr. Dart states this only as his own opinion, without asserting that it is established by the authorities ; but it seems to me that, on the principle he thus states, the different decisions can be reconciled, and that they cannot be reconciled in any other way. *Johnson v. Legard* (a) is the case mainly relied upon by the defendant. There Sir John Legard, on his marriage, in consideration of the marriage and marriage portion, settled his estate on himself for life, then to trustees to receive a rentcharge by way of jointure to his intended wife, then to trustees to raise portions for the younger sons and daughters of the marriage, remainder to the sons of the marriage in tail male, remainder to the

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(a) 6 M. & Sel. 60.



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sons of Sir John Legard by any remainder to the use of Sir John for life, with remainder to his son, on a case sent to them, limitations, subsequent to those of other sons of Sir John Legard good as against a purchaser according to the practice then existing for this judgment. The Vice-Chancellor but his reasons are not reported. The Chancellor (Lord Eldon) reverses but his reasons are not reported. It is not material to the present question that he did not wish anything to be done as existing upon his mind. King's Bench. But he did not follow the principle of that decision.

In *Sutton v. Chetwynd* (c), Sir John says "the decision in *Johnson v. Legard* is a proposition that *every* limitation is good and rendered valuable by the case to that extent (says he) I entertain no doubt. I say to that extent, but the general proposition is sufficient for the present case, and I do not wish to say anything that may be made when the case comes to the Court."

To the extent to which Sir John limits his judgment the case of *Johnson v. Legard* goes, and so far it seems to me to be in accordance with the principles I have been stating, the present case being in favour of the two other decisions which, the Vice-Chancellor's decision in *Johnson v. Legard*,

(a) 3 Madd. 283.

(c) 3 Meri



me consistent with it, if it is to be understood as a decision adverse to these principles, and in favour of the defendant in the present case.

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The first of these is *Newstead v. Searles* (a). There, a widow having children, and being about to marry again, made a marriage settlement under which her husband took an interest in the real estate of the wife, in some respects (as in the principal case) greater than he would have done if there had been no settlement, and in some respects less; and the ultimate remainder was settled for the benefit of her existing issue as well as those, if any, of the contemplated marriage. Lord *Hardwicke*, C., held that the limitations in favour of her existing issue were good as against a purchaser. It was said in the argument before us that this decision proceeded merely on the ground of public policy; but Lord *Hardwicke* does not say so. He states the question to be, whether the articles of the 30th of April were for a *valuable* consideration, and binding, or ought to be considered as *voluntary*; and he concludes by what I understand as a terse compendium of what I have before endeavoured to state as a reason for supporting all limitations shewn not merely to be included in the marriage settlement, but to be part of the marriage contract. He says that there are reciprocal considerations both on the part of the husband and wife. It was said also in the argument that *Newstead v. Searles* was an anomalous case, and not approved of; but no case was cited, nor do I find any, in which it has been questioned or disapproved of.

Lord *Mansfield* in *Doe v. Routledge* (b) cites it as an authority. Lord *Ellenborough* in his elaborate judgment in *Doe v. Manning* (c), in differing from Lord *Mansfield*, treats *Newstead v. Searles* with great respect, as if he thought it a weighty authority, as, no doubt, every

(a) 1 Atk. 268.

(b) Cowp. 705.

(c) 9 East, 59. 65.



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decision of Lord *Hardwicke's* must be, and expressly cite it as a case where the settlement was founded on valuable consideration. The next case is *Clayton v. Lord Wilton* (a). There the settlement was to the use of the husband, and remainder to trustees to receive the wife's jointure, remainder to the sons of the marriage in tail male, remainder to the sons of the husband by any future wife in tail male, and remainder to the daughters of the marriage. The Court of King's Bench, including Lord *Ellenborough*, C. J., and Lord *Bayley*, J., who afterwards formed part of the Court sitting in *Johnson v. Legard*, certified that a conveyance for value to a purchaser was not good against the issue of a second marriage, and Lord *Eldon*, as Chancellor, confirmed this. The reasons for this decision are not given, so that as in the case of *Johnson v. Legard*, we cannot be sure of what principle it proceeded. It is suggested in a work of high authority (*Sugden on Vendors*), that it may have been because the limitations to the sons by the second marriage were necessary to support the limitations to the daughters by the first marriage; but, as there were trustees to preserve contingent remainders, this was not necessary even if the reason itself were sufficient. It is sometimes said that the decision is to be supported because the persons benefited in this case were children of the settlor, whilst in *Johnson v. Legard* they were collaterals. But though the consideration for a settlement in favour of a child may be better, of higher morality than the consideration for one in favour of a brother, it is in no respect more of a valuable consideration; and after the elaborate judgment in *Doe v. Manning* (b) it seems to me impossible to suppose that Lord *Ellenborough* decided *Clayton v. Lord Wilton* on the ground that any voluntary conveyance could be good against a purchaser for value. *Clayton v. Lord Wilton* may be supported

(a) 6 M. & Sel. 67, n.

(b) 9 East, 59.

and reconciled with *Johnson v. Legard* on the principle that, though, as Sir *W. Grant* says in *Sutton v. Chetwynd*, it is not true that *every* limitation in a settlement is protected and rendered valuable by the consideration of marriage, or even, as is said by Lord *Macclesfield, C.*, in *Osgood v. Strobe (a)*, "though it is to be *presumed* that the wife and her friends stipulated only for the limitations in favour of the husband, wife and issue of the marriage;" yet when, as in *Newstead v. Searles*, and in *Clayton v. Lord Wilton*, and, as I think, in the principal case, the limitations so interfere with those which would naturally be made in favour of the husband, wife and issue, as to indicate that the limitations must have been discussed, and made part of the marriage contract, part of the reciprocal considerations between the husband and wife, that presumption is rebutted, and the limitations are not voluntary.

It is, I think, impossible to suppose that Lord *Eldon*, Lord *Ellenborough* and *Bayley J.*, in *Johnson v. Legard* overruled the decision in *Clayton v. Lord Wilton*, to which they themselves were parties.

I cannot see, in any way, how the two cases are to be reconciled except on the principle which, as it seems to me, is involved in the judgment in *Newstead v. Searles*. I cannot find that this principle is impeached by any of the other cases, and, thinking it sound and bearing on the present case, I am of opinion that the judgment ought to be affirmed.

WILLES, J., said.—I am also of opinion that the judgment ought to be affirmed: but, after the elaborate statement I have heard, and anticipating those which will follow, I think that I should not usefully occupy time in stating my reasons at large.

(a) 2 P. Wms. 245. 255.

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COCKBURN, C. J.—I am of the Court of Exchequer in this, but I am unable to concur in the decision of that Court appears to have assumed that the property made by the settlor on her marriage with her son, was not her own separate property but was introduced into the settlement by her intended husband, who is supposed to have taken a condition of his marrying the wife to bring this provision within the clause. I cannot concur in the assumption that this is founded, and I am desirous of stating the ground on which my judgment rests. The limitation cannot, in any way, be valid without consideration of the marriage: nevertheless, that it may be upheld.

If the construction of the statute had been *res integra*, there had been no change in modern times, has had to apply the rule, which probably have excluded from its operation. It was made honestly and without any fraud, and it comes under review without eliciting any of the forced and harsh constructions of the expounders; but its operation in relation to purchasers for value, whether with or without advances in favour of relations, however praiseworthy, if made without value, is too firmly established to admit of being questioned. It must now be taken as definitive, even for a man's wife and children. On the moral point of view the duty of a man, if he may be, is bad against a future purchaser, and consideration and voluntary.

On the other hand, it is equally well established that a settlement, made with a view to marriage, on a wife and the issue of the marriage, will undoubtedly be good against a future purchaser for value although without notice.

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Why this distinction? Simply because the estates and interests created by the settlement are acquired from the settlor for a valuable consideration, namely, the marriage of the party for whose benefit, or the benefit of whose issue, the disposition of the property so made is to enure, either with the settlor, or some near relative of the settlor, in which latter case the bargain may be said to be made with the settlor just as much as if it had been made with an intended husband. In every such case it is manifest that, as to a disposition of property for the benefit of the opposite party or their issue, the consideration moves to the settlor. The disposition has been purchased by the marriage of the party by whom it may be assumed to have been stipulated for, and having been thus obtained for a valuable consideration it is good against the settlor and against any future disposition of the property which he or she may make, even to an innocent purchaser.

On the other hand, a disposition made by a settlor in favour of his or her own relatives not being the issue of the marriage, cannot, as it seems to me, be said to be made for a consideration arising from the marriage. The settlor is only exercising a right which he or she had before. No additional right or power in this respect is derived from the marriage. No doubt, such a disposition would not be made without the knowledge and acquiescence of the other contracting party, but that acquiescence adds nothing to the previously existing right of the settlor. Nor, except under very special circumstances, can it be supposed that a disposition in favour of the settlor's own relations, would be stipulated for by the opposite party. Certainly, such circumstances, as being

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contrary to the ordinary course be specially shewn. In the being no consideration moving disposition voluntary in that sense is so in the largest sense, inasmuch as any time before the settlement the settlor should change his mind as to such part of it, this would be a contract, and there would be no right to insist on the provision, but to no other conclusion, therefore a marriage settlement in favour of a son other than the issue of the marriage, and no consideration of the marriage, and no other consideration, must be shewn.

The case of a father tenant in tail, in a settlement, stands on an entirely different footing. The considerations are very different considerations. In the case of the tenant for life being necessary, as the estate is a fee simple, he has a right to stipulate for the price of his concurrence in the settlement. The consideration, there, is not the consent of the settlor to give up the estate, but to resettle the estate.

The limitation introduced in the case of the illegitimate son is in favour of her illegitimate son. It is within the consideration of the settlor, let us see whether there can in any way have been stipulation by the husband so as to make it part of the consideration by marrying the settlor. The consideration, there, is not the other way. It is suggested

on a provision being made for the son, lest, the latter being left destitute, he, the husband, might have to maintain him; or that from a high-minded generosity he may have declined to profit by his wife's estate, unless a provision were made out of it for her son. But these suggestions are purely speculative, and rest on no proof of any sort; while it is infinitely more consistent with probability and the common experience of life that such a stipulation should have emanated from the settlor, to whom both duty and affection would suggest the propriety of making a provision out of her own estate for her own offspring. The suggestion as to the intended husband having insisted on the provision for the son from an apprehension of having to provide for him, is altogether answered by the fact that an estate for life is secured by the settlement to the husband, and that consequently the limitation in favour of the son could not come into operation until after the husband's death; and, therefore, could afford him no protection against the contingency suggested. Under these circumstances I can come to no other conclusion, than that in no point of view can this limitation be considered as within the consideration of the marriage upon which this settlement was made, and therefore that it must in this sense be held to be voluntary.

Nevertheless, I am of opinion that this limitation should be upheld. Upon the rule that in a marriage settlement a limitation in favour of the relatives of the settlor, other than the issue of the marriage, will be invalid, two exceptions have, it seems to me, been engrafted by very high authority. In *Newstead v. Searles* (a), Lord *Hardwicke* held that in a marriage settlement the settlor might introduce a limitation in favour of the children of the former marriage; while, in *Clayton v. The Earl of Wilton* (b),

(a) 1 Atk. 265.

(b) 6 M. & Sel. 67, n.

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Lord *Ellenborough* and the Court of King's Bench upheld against a purchaser for value, a similar limitation in a marriage settlement in favour of the issue of the settlor by future wife in default of issue of the intended marriage. These decisions have never, so far as I am aware, been impugned. The decision of Lord *Hardwicke*, in *Newstead v. Searles*, which has now stood for upwards of a century, cited by Lord *St. Leonards* in a recent work as an existing authority. It is evident that Lord *Hardwicke* considered that a provision in a marriage settlement in favour of existing children could not be deemed fraudulent within the statute. It may be that these decisions would not stand the test of a very strict analysis or rigorous logic; but must be borne in mind that the rule on which this exception was engrafted was itself the result of a forced and arbitrary construction of the statute. It is not to be wondered at, that judicial exposition stopped short of applying it when the consequence was to prevent the owner of property, on making a settlement on marriage, from making any binding provision for his existing children. We ought not, in my judgment, to overrule the cases to which I have referred. Having stood thus long unimpeached, they must have led to the introduction of similar provisions into many settlements, and we cannot tell what mischief we may occasion by overturning them, while no mischief can arise from sanctioning such limitations beyond what arises from their introduction in favour of the issue of an intended marriage.

The present case appears to me to come directly within the principle of *Newstead v. Searles*. It was as much the duty of the settlor, Mary Dickenson, to make provision for her illegitimate son as though he had been legitimate. It is impossible not to concur in the very appropriate remark on this point made by Channell, B., in delivering the

judgment of the Court of Exchequer. This being so, on the authority of *Newstead v. Searles*, which I think we ought not to overrule, I am of opinion that the decision of the Court of Exchequer should be affirmed.

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WIGHTMAN, J., said.—I agree with the Lord Chief Justice and for the reasons given in the judgment he has read. Though for a considerable time I entertained very great doubt on the point, on the whole I have come to the conclusion that the judgment should be affirmed.

WILLIAMS, J.—I am of opinion that the judgment of the Court of Exchequer ought to be reversed.

The authorities on the question raised in this case, viz., what shall be deemed a fraudulent conveyance under the statute 27 Eliz., are so irreconcilable that it seems more advisable to consider and apply the principles which have been settled respecting it than to rely on the authority of any particular decisions.

It is established, after no little conflict of cases, that though the statute speaks only of conveyances, &c., “for the intent to *defraud* and deceive such persons as shall purchase the same lands,” &c., yet (to use the words of Lord *Ellenborough*, in delivering the judgment of the Court in *Doe v. Manning* (a),) “every conveyance without valuable consideration is made void by the statute, against a subsequent purchaser for such consideration,” because, as against him, the Court presumes fraud from the absence of consideration, and will not admit such presumption to be contradicted. It follows that settlements, though made on what is called *meritorious* consideration, as when made in the honest fulfilment of the moral duty of a husband or parent to provide for his wife and children, are within

(a) 9 East, 59.

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the statute, and void as against a subsequent purchaser for value. Again, it has never been doubted that marriage is a valuable consideration; so that an ante-nuptial settlement is not rendered void by the statute, but is good against any subsequent purchaser. There has been much difference of opinion respecting the extent to which the consideration of marriage ought to be carried in supporting the limitations of such a settlement, and cases are not wanting in which it has been laid down that every limitation in such a settlement is protected and rendered valuable by the consideration of the marriage. But subsequent decisions, (as Sir *W. Grant* said, in *Sutton v. Chetwynd* (a),) have negatived this general proposition, and the question left open is that which has been the subject of the argument before us, viz., what class of limitations in the settlement the consideration of marriage can properly be said to support.

Now, in order that he who claims under any limitation may be deemed, as against subsequent purchasers, to take for a valuable consideration, and not as a volunteer, it is obviously necessary that he, or some one on his behalf, should have *purchased* the limitation in question.

If he can support the limitation in his favour against a *subsequent* conveyance for valuable consideration, he must also be able to support it against a *prior* voluntary one, and avoid the latter under the statute, in the character of a *purchaser* for value by reason of a *purchase* made by himself, —or some one else for his benefit. Thus *Turner*, V. C., in *Heap v. Tonge* (b), speaking of the cases in which limitations to collaterals in marriage-settlements of the husband's estate have been held void, says:—"These cases proceed on the ground that the wife cannot be considered to stipulate on the part of the relations of the husband, and there is, therefore, *no one who purchases anything* for the benefit of

(a) 3 Meriv. 249. 254.

(b) 9 Hare, 90. 104.

those relations. If there be any one purchasing on behalf of collaterals, the limitations are supported."

Now, in a settlement, in contemplation of marriage, of the estate of the husband or wife, he or she, to whom the estate to be settled belongs, being the *grantor* of the estates created by the settlement, cannot, it should seem, be deemed to have thereby *purchased* any one of them; but the party to whom the estate does *not* belong may be regarded as having purchased by the marriage all those limitations of the estate for which he or she can be proved, or fairly inferred, to have stipulated, such as the limitations in favour of themselves respectively, or their issue. And so with respect to limitations in favour of the collateral relations of the party to whom the estate does *not* belong; for it may well be presumed that such party stipulated, as part of the marriage bargain, for their insertion into the settlement, and so may be properly regarded as having purchased them on behalf of those who are to be benefited thereby. But an intended wife cannot be *inferred* to have stipulated on the part of the relations of the intended husband, nor the intended husband for the relations of the intended wife.

Applying these principles to the case before us, the circumstances of which are, that the estate belonged to the wife and the limitation under discussion was in favour of her illegitimate son; the question is whether, from the terms and nature of the settlement (for there is no external proof), it can be *inferred* that the husband stipulated for this limitation. If it was introduced at the instance of the wife, she cannot be deemed to have purchased the estate, in consideration of the marriage, on behalf of her son, because she cannot be regarded as purchasing the limitation which she carved out of her own estate.

But it has been contended that wherever the limitations

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of a marriage settlement diminish the ordinary interests which the party to whom the estate does not belong would have acquired by the marriage, it ought to be inferred that the limitations of the settlement were the subject of arrangement and bargain in contemplation of the marriage; and accordingly that, in the present case, it must be presumed that there was a bargain between the parties, to the effect that, if the wife predeceased the husband, he should take an interest for his life in one moiety of his wife's estate absolutely, whether there was a child of the marriage, so as to entitle him to curtesy, or not; and that the wife might limit the other moiety to her son in fee to the exclusion of the issue of the marriage. I do not at all dispute this proposition, but the existence of such a bargain does not justly lead to an inference that the husband stipulated for these limitations; on the contrary, when the ordinary rights of the husband, or of his issue by the marriage, are diminished the natural presumption is that the wife insisted on such diminution, and he must be deemed to have been induced by the consideration of her acceding to the marriage, to allow her to deal with her estate according to her own wishes, at the sacrifice of his. It cannot be properly asserted that such a bargain is a concession to the husband in consideration that he will marry the wife; but it is rather a concession to the wife that, if she will marry him, she shall be allowed to settle her own estate, as her wishes may guide her, in favour of the objects of her bounty: in other words, that she shall be allowed to make a voluntary settlement of it. Suppose a case of a marriage settlement where a still stronger inference arises that it must have been the result of a matrimonial bargain, as where the husband consents that the whole estate of the wife shall go after her death, to such persons as she shall by deed or will appoint, would not her appointees under such a settle

ment be volunteers? Could it be said that they are not so, because the wife must be deemed to have bargained with the husband that she should have the power to give her estate to whomsoever she liked, and to deprive, if she wished it, both himself and his issue by her of any participation in her estate?

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In the present case it appears to me, on the principles above stated, that since the limitation in question was created by the wife, in favour of her illegitimate son, out of her own estate, and it has not been proved, nor can it be justly inferred, that the son himself or the husband or any one else purchased the limitation on behalf of her son, it must be deemed to have been created without any valuable consideration, and so to be fraudulent within the statute.

But it is said that our decision ought to be governed by the authority of *Newstead v. Searles* (a). In that case a widow, previous to her second marriage, with the consent of her intended husband, settled her estate upon her issue by a former marriage, provided that if there should be issue of the second marriage such issue should have an equal share with the issue of the former marriage; the husband and wife afterwards mortgaged the estate to a person who had notice of the settlement. Lord *Hardwicke* said the question was whether the articles were for a valuable consideration and binding, or ought to be considered as voluntary and fraudulent with respect to subsequent creditors or purchasers; and if he was to lay it down as a rule that such articles were not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former marriage, and the second husband might then contrive to defeat the provision made for those children. Taking the case with all its circumstances, he thought the settlement no voluntary agreement,

(a) 1 Atk. 265.

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but a binding one. He added, that it would be difficult to shew that such a limitation had been held fraudulent and void as against subsequent purchasers or creditors.

It may be remarked, with respect to this judgment, that Lord *Hardwicke* does not say, expressly, that the limitation to the issue of the former marriage was upon a valuable consideration. He adverts, it is true, to the existence of reciprocal considerations, both on the part of the husband and wife, by the provision under the articles for the children of the second marriage; but this appears to me (with deference to what is said in the judgment of the Court in *Doe v. Manning* (a)), to be at least as much for the purposes of strengthening his observation, that such a limitation had never been held, nor ought to be held, *fraudulent*, as for asserting that it was supported by a valuable consideration. And it should be further observed that in the year 1737, when this decree was made, the law had not been yet settled, as it has since been, that *every* limitation without a valuable consideration was fraudulent under the statute as against a subsequent purchaser for value. Six years later, in *White v. Sanson* (b), Lord *Hardwicke* himself says:—"I have heard it said in this Court that there are reasonable voluntary settlements, which they will not interpose to disturb upon the construction of these statutes (13 & 27 Eliz.);" and in the same judgment he had previously said:—"I hardly know an instance where a voluntary conveyance has not been held fraudulent against a subsequent purchaser." And twenty years later, in *Cadogan v. Kennet* (c), we find Lord *Mansfield* saying:—"The statute 27 Eliz. c. 4, does not go to voluntary conveyances merely, as being voluntary, but to such as are fraudulent." And in *Doe v. Routledge* (d) the same Judge said that in the statute there was not a word that impeached voluntary

(a) 9 East, 59. 64.

(b) 3 Atk. 410. 412.

(c) Cowp. 432. 434.

(d) Cowp. 705.

settlements merely as being voluntary, but as fraudulent and covinous.

It may likewise be observed, in order to prove how far from settled the law on this subject was at the time when *Newstead v. Searles* was decided, that Lord *Hardwicke* in that case relies on the fact that the mortgagees had notice of the marriage settlement, which, according to the doctrine since established, does not at all affect the right of the subsequent purchaser for value. And, further, that Lord *Hardwicke* speaks of the two statutes of the 13 & 27 Eliz. as if the one put voluntary conveyances exactly on the same footing, as to creditors, as the other puts them as to subsequent purchasers, which is a very different view from that taken of the two Acts at the present time.

I will add that Lord *St. Leonards*, in his treatise on Vendors and Purchasers, does not cite the case of *Newstead v. Searles* while discussing the question whether the marriage consideration runs through the whole settlement, but as an authority for a previous passage in his treatise, viz. "On the ground of policy, it seems that a settlement by a widow previous to her second marriage, of her estate on the children of the first marriage, will not be deemed *fraudulent*." And in Cruise's Digest, vol. 4, p. 72, 3rd ed., the case is stated as authorising the proposition that "there is one case in which a conveyance founded on a *moral* consideration only has been held good against a subsequent purchaser, viz. that of a widow making a settlement on her children by her first husband previous to her marrying a second."

If either policy or moral duty were really the ground of that decision, it might become a question whether it could be properly applied to a limitation in favour of the illegitimate son of the settlor; but it is difficult to understand how policy or moral duty can be sufficient to uphold Lord *Hardwicke's* decision at this day, seeing that the limitation

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to the issue of the former marriage must still remain unsupported by any valuable consideration. It is more reasonable, I think, to say that Lord *Hardwicke* decided the case before the principles of law which would have guided him to a different conclusion were well understood; and that his decision, being in conflict with the doctrines which have since been firmly established, cannot now be regarded as binding; but must be classed with the numerous other cases which have been decided on this head of law by eminent Judges in earlier times, and have since been disregarded by the Courts on a fuller consideration of all the authorities on the construction of the statute.

Judgment affirmed

April 19.

JOHN GREENHOW and EDWARD BURTON v. PARKER (a)

The 3 & 4 Wm. 4, c. 42, s. 22, which empowers the Court or a Judge in any action, the venue in which is by law local, to order a suggestion to be entered, that the trial may be had in another county, applies to penal actions within the 31 Eliz. c. 5, s. 2.

DECLARATION—That, at all times in this declaration mentioned, there was a union of the township of Prest Patrick, and divers other parishes and places, formed for the purpose of the administration of the laws for the relief of the poor by the name of the Kendal Union, which union was so formed pursuant to and in accordance with the laws in force relating to the poor, and was called the Kendal Union: that, at all the times, &c., there was a workhouse which had been, and was duly constituted and managed, and was, one of the common workhouses or places for the reception and relief of the poor of such township, parish

A guardian of the poor who has knowingly supplied, for his own profit, goods for the use of the poor in the workhouse contrary to the provisions of 55 Geo. 3, c. 137, s. 6, and 4 Wm. 4, c. 51, is liable to the penalty thereby imposed whether the master of the workhouse to whom he sold the goods was authorized to enter into such a contract or not.

(a) Decided in Easter Term.

and places, pursuant to and in accordance with the same laws: that there was a board of guardians of the poor for such union duly constituted and chosen, and the defendant was one of the guardians of the poor of such union, and had been elected, chosen, appointed and constituted such guardian pursuant to (4 & 5 Wm. 4, c. 76), and the other laws in force in that behalf, in respect of the township of Preston Patrick: that the defendant was appointed to be a person in whose hands the collection of the rates for the relief of the poor of the said townships, &c., forming the said union, and the providing for, ordering, management, control and direction of the poor of the said townships, &c., was placed, as such guardian, pursuant to, and in accordance with, the laws relating to the relief of the poor: and the defendant, while he was such guardian, and while he retained such appointment as such guardian, and while he was, and while he so retained such appointment as a person in whose hands such collection and such providing for, ordering, management, control and direction was so placed, did, before the commencement of this suit, in his own name, furnish and supply, for his own profit, and was directly concerned in furnishing and supplying for his own profit, divers goods and materials for the use of the said workhouse, and otherwise for the support and maintenance of the poor in the said townships, &c., so forming the said Union, he the defendant not having at any time obtained any certificate from any justice of the peace, or of any other person, permitting and suffering him so to do, or permitting him or suffering him to contract or agree for the purchasing, or supplying of the same, or any article or thing whatsoever, contrary to the form of the statute, &c., whereby an action hath accrued to the plaintiffs to demand and have of and from the defendant the penalty or sum of 100*l.*, &c.

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Plea: Not guilty.—(By statute 21 Jac. 1, c. 4, s. 4.)

The venue was originally laid in Westmoreland; but, by a Judge's order, made under the 3 & 4 Wm. 4, c. 42, s. 22, it was directed that the trial should be had in the Northern Division of Lancashire; and a suggestion for that purpose was entered on the record.

At the trial, before *Keating, J.*, at the Spring Assizes at Lancaster, it appeared that the action was brought by the plaintiffs, who were two of the guardians of the Kendal Union in Westmoreland, against the defendant, for a penalty alleged to have been incurred by him under the 4 & 5 Wm. 4, c. 76, s. 51, and the 55 Geo. 3, c. 137, s. 6. It was proved that the defendant had been duly appointed a guardian of the Kendal Union, and that, while holding that office, he had sold a quantity of chaff for 30s. to one Jackson, the master of the Kendal Union Workhouse. The amount so paid was entered in the accounts of the workhouse. The chaff was used for making beds for paupers. The price was much greater than had ever previously been paid.

The defendant's counsel submitted, first, that the plaintiffs must be nonsuited, because the trial should have been had in the county of Westmoreland, and, secondly, that though the goods were supplied to the master of the workhouse, it must be taken that the supply was personally to him; that there was no evidence of the supply of goods to the workhouse, and no contract with the guardians, or supply to them; and on this point he referred to the following orders of the Poor Law Commissioners. Art. 44. All contracts to be entered into on behalf of the union relating to the maintenance, clothing, lodging employment or relief of the poor, or for any other purpose relating to or connected with the general management of the poor, shall be made and entered into by the guardians. Art. 85. The guardians shall examine, &c., every bill exceeding in amount

one pound (except the salaries of officers) brought against the union; and, when any such bill has been allowed, &c., a note of such allowance shall be made upon the face of the bill before the amount is paid. Art. 209. The master shall not, except in case of necessity, purchase or procure any articles for the use of the workhouse, &c., nor pay any monies on account of the workhouse, or of the union, without the authority of the guardians, &c.

The learned Judge asked the jury, first, whether the defendant knowingly supplied the chaff for the use of the poor in the workhouse, and, secondly, whether he supplied it for his own profit. He told them that if the defendant really believed that he was furnishing the chaff to the master of the workhouse for his own personal use, they must find a verdict for the defendant: that, as to the suggestion that the master had no power to enter into such a contract, he did not think that was material; it was almost impossible that the board, who met but once a week, could make all the contracts; the master might make them in the first instance, and submit them to the board. The jury having found a verdict for the plaintiffs,

Overend now moved to arrest the judgment, or for a new trial.—This is an action for an offence against a penal statute, which must be laid to be done, and be tried, where the offence was committed: 31 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 4, s. 2. [*Wilde, B.*—The venue was originally laid in the proper county.] The 3 & 4 Wm. 4, c. 42, s. 22, after reciting that “unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen,” enacts “that in any action depending in any of the said superior Courts the venue in which is by law local,” the Court or a Judge may order a suggestion to be entered that the trial may be had in another county.

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This enactment applies only to actions which are local common law, such as actions for trespasses to real property.—Secondly, the learned Judge misdirected the jury in leading them to believe that the master may have had authority to buy the chaff, which is contrary to Article 209; and Article 85, it is clear that nobody could have had authority to pay the defendant without the allowance of the board guardians.

POLLOCK, C. B.—We think that the ruling of the learned Judge was correct. The 3 & 4 Wm. 4, c. 42, s. 22, empowers the Court or a Judge to order a suggestion to be entered “in any action depending in any of the superior Courts the venue in which is by law local.” This action comes within the words of the section. As to the other point, the language of the 55 Geo. 3, c. 137, s. 6, is very general and I agree with the learned Judge who tried the case that a guardian who, for profit, supplies goods to the defendant is liable to the penalty, whether the person who contracts with him is authorized to do so or unauthorized. There can be no rule.

MARTIN, B.—I am of the same opinion. I should rule against it if we were obliged to hold the first objection valid; the language of the 3 & 4 Wm. 4, c. 42, s. 22, is clear.

BRAMWELL, B.—I agree that there ought to be no rule. As to the first point, the 21 Jac. 1, c. 4, s. 2, is out of the question because it does not extend to any offence on any penal statute passed subsequently: *Rex v. Gaul* (a), *Anonymous* (b). The 31 Eliz. c. 5, s. 2, provides that “the offence against any penal statute shall not be laid to be done in any county but where the contract or other matter alleged

(a) 1 Salk. 372.

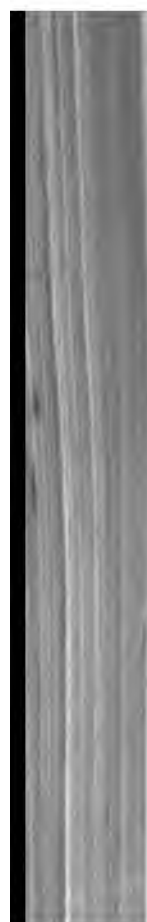
(b) 5 Mod. 425.

be the offence was in truth done." Here the offence was not laid to be done in any other county than where the supply took place. The statute goes on to provide that in any such action the defendant may traverse that the offence was not committed in the county where the same is alleged. Now if the statute directed that the *trial should take place* where the offence was committed, it would seem that the appropriate mode by which a defendant should avail himself of his privilege would be, not by traversing the allegation, but by moving in arrest of judgment, on the ground that, by law, the trial ought to take place where the offence was committed. Mr. *Overend* contends that the statute is express that the trial shall take place in such county; that, however, is not expressly enacted—it is only an incidental consequence. When, therefore, we hold that the 3 & 4 Wm. 4, c. 42, s. 22, authorized us to order a trial to be had in another county, we do not decide that a particular statute is repealed by a subsequent general Act, because the right of the defendant to a trial in the county of Westmoreland is one which is given him by the general law of the land. This is an action in which the venue is, by law, local, and therefore the Judge had power to order the trial to be had in another county:

Rule refused.

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ACCIDENT, DEATH BY.

See INSURANCE (3).

ACCORD.

*By giving up possession of a House—
Evidence of—Statute of Frauds.*

To an action for goods sold the defendant pleaded, that he was possessed of a public house, and it was agreed that, in consideration that the defendant would give up possession of the same, the plaintiff would pay the defendant 100*l.*, and discharge the defendant from the debt; that the plaintiff paid the 100*l.*, and the defendant quitted the house. The agreement was not in writing.—*Held*, that, having been executed, it was receivable as evidence to prove the plea.

Semble, that the plea, though pleaded as an equitable defence, was a good plea at common law, by way

of accord and satisfaction. *Lavery v. Turley*, 289

ACCOUNT STATED.

In order to support an account stated there must be an admission of a debt due. Therefore where the defendant verbally agreed to purchase of the plaintiff the lease and goodwill of his premises, and, on being asked for a deposit, gave an I. O. U. for 25*l.*, but afterwards refused to complete the purchase:—*Held*, that the I. O. U. was not evidence of an account stated. *Lemere v. Elliott*, 656

ACTION ON THE CASE.

See FALSE REPRESENTATION.

ACTION ON THE CASE FOR NEGLIGENCE.

Liability of gratuitous Lender for Accident caused by Defect in the article lent.

A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant while using it, from its defective state, if the lender was not aware of it.

The defendant, a builder, had purchased a house which he pulled down with the exception of a party wall. For his own use he erected a scaffold. P. asked him for the job in pulling down the party wall, and a written agreement was entered into by which P. agreed to do it for 17*l*. No mention was made in the agreement or otherwise of the use of the scaffold, but the plaintiff was aware that it was afterwards used by P. P. employed the plaintiff to pull down the party wall, and whilst doing so one of the putlogs, which was rotten, broke, and the plaintiff was thrown to the ground and seriously injured. The defendant was not aware of the defect in the putlog. — *Held*, that the defendant was not liable. *MacCarthy v. Young*, 329

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See CONTRACTOR.
CORPORATION, MUNICIPAL.
MASTER AND SERVANT.

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AGENT.

Liability of, on Contract.

D., the defendant, entered into the following contract with R., the plaintiffs: — "22nd March, 1860. From J. D., Corn Broker, to Messrs. R. Liverpool. Dear Sirs,—I have this day sold to you two cargoes of French maize, to consist of 800 to 1000 quarters, shipment all April, from the port of Bordeaux, at 33*s*./3*d*. per 480 lbs. cost and freight, payment in London, less 60 days' interest and 1*o*/₆ brokerage. Mr. J. Walker, London, will send contracts." On the following day Walker forwarded contracts for the two

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The Lancashire and Yorkshire Railway Company, Resp., 211

(3). *Practice—Right to Begin.*

On an appeal, under the 20 & 21 Vict. c. 43, against the decision of justices dismissing the complaint, the appellant begins. *Ellis, App., Kelly, Resp.,* 222

See COUNTY COURT (3).

ARBITRATION.

Action for Money paid to recover Moiety of Expenses of Award.

Where two parties employ an arbitrator, and one pays the arbitrator's fees to enable him to take up the award, (there being no event of the award to entitle either party to costs), the party so paying is entitled to recover from the other a moiety of the sum paid as money paid to his use. *Marsack v. Webber,* 1

See COMMON LAW PROCEDURE ACT, 1854 (1).
LANDS CLAUSES CONSOLIDATION ACT.

ASSAULT.

Aggravated, 16 & 17 Vict. c. 30, s. 1—
"Unlawfully abusing a Woman"—
Jurisdiction of Justices.

On a rule to shew cause why a habeas corpus should not issue to bring up the body of a prisoner, it appeared from the affidavits, that the information charged that one W. T. "did unlawfully assault and abuse"

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Susannah T. In stating the case before two justices sitting in petty sessions, the prosecutrix's attorney detailed facts, shewing a violation or attempted violation of the prosecutrix's person against her will. The prisoner's advocate objected to his giving evidence of anything but a common assault, but, after some argument between the advocates and the justices, it was agreed that the case should be taken under the Aggravated Assaults Act, 16 & 17 Vict. c. 30. The prosecutrix stated that the prisoner began to "rawl" her for about a quarter of an hour; that she rawled till she could not rawl any longer with him, when he put her against a gate and had connexion with her against her will. She was cross-examined as to whether she had not consented to what took place. The justices convicted the prisoner, and in the commitment stated that they found the assault to be proved, and to be of such an aggravated nature that it could not, in the opinion of the justices, be sufficiently punished under the 9 Geo. 4, c. 31; and the justices therefore, in pursuance of the 16 & 17 Vict. c. 30, adjudged the said W. T. to be imprisoned &c. for six months. —*Held*, that the 16 & 17 Vict. c. 30, s. 1, applies only to common assaults, and not to an assault accompanied by any circumstances which make it a distinct offence recognised by the law as something more than a mere assault—such as an assault with intent to commit a rape. *Per totam Curiam.*

Per Pollock, C. B., and Wilde, B., that inasmuch as the charge was not of a common assault, and the evidence did not point to a common assault, but to a rape or an attempt to commit a rape, the justices had no jurisdiction.

Per Bramwell, B., and Channell, B.,
EXCH.

that the information charged an assault, and that as it was possible that the justices might have disbelieved the charge of rape or attempt to commit a rape, and found that nothing more took place except an assault of an aggravated character, the rule ought not to be made absolute. *In re Thompson*, 193

ASSIGNMENT OF DEBT.

Evidence of.

See EVIDENCE (2).

ATTORNEY.

Delivery of Bill.

The defendant, the surveyor of highways of the parish of L., retained the plaintiff to defend an indictment against the parish for the non-repair of a highway. Pending the proceedings the defendant ceased to be surveyor, and a new surveyor was appointed. In a correspondence between the defendant and plaintiff as to the costs of the indictment, the defendant requested the plaintiff to send his bill of costs to the new surveyor. The plaintiff sent by post his bill of costs to the defendant in the following letter:—"Herewith you have my bill of costs in the L. matter. I have sent a copy to the surveyor of the parish of L." The bill was headed "The surveyor of the highways of the township of L., and the inhabitants of the said parish, debtors to C." (the plaintiff.)—*Held*, that as the 6 & 7 Vict. c. 73, s. 36, does not require any heading to an attorney's bill, the requisites of that statute were complied with, since the bill and the letter sufficiently notified to the defendant that he was the party to be charged. *Champ v. Stokes*, 683

BANKER.

Money paid by London Banker for Customer of Country Banker—Privity of Contract.

The defendant, a merchant at Hull kept an account with the Hull bank upon the terms that they should procure P. and Co., their London agent, to accept on their credit bills drawn by the foreign correspondents of the defendant against their consignments to him, and of which P. and Co. were advised by the Hull bank. The defendant paid the Hull bank a quarter per cent. on the amount of the acceptances, and he paid P. and Co. a fixed annual sum for transacting their London business. When a bill was accepted by P. and Co., the Hull bank debited the defendant with the amount, as they charged him interest from the time the bill was due. The Hull bank became bankrupt, and P. and Co. paid all bills accepted by them which were due after the bankruptcy—*Held*, in the Exchequer Chamber (reversing the decision of the Court of Exchequer), that the assignees of the Hull bank, and not P. and Co., were entitled to recover from the defendant the amount of such bills. *Barkworth and Others, Assignees v. Ellerman*, 6

BANKRUPTCY.

(1). *Act of—Fraudulent Sale.*

If a trader raises money by selling his goods at an under value (not the purpose of carrying on his business, but in contemplation of stopping payment, and for the purpose cheating his creditors), to one who has notice either by express inform

tion, or from the nature of the transaction that he is selling his goods not in order to carry on his business but with a fraudulent intention, the sale is an act of bankruptcy and void, and the assignees may recover the goods from the purchaser. *Fraser and Others, Assignees, v. Levy*, 16

- (2). 12 & 13 Vict. c. 109, s. 280.—
Composition, Payment of.

To an action of debt the defendant pleaded, that after the accruing of the debt he became bankrupt, and that, after the bankruptcy, he and P. R., in pursuance of the 280th section of the Bankrupt Law Consolidation Act, 1849, made an offer of composition, which was accepted by nine-tenths in number and value of the creditors, the offer being to pay 4s. in the pound, in full satisfaction of his debts, such composition to be paid to all the creditors in cash within fourteen days after the second sitting to be appointed under the 280th section: that the Court ordered the adjudication to be annulled: that P. R. joined in making the offer of composition, in consideration of all the effects of the defendant being assigned to him by the defendant: that the defendant and P. R. paid the composition to the other creditors, and that the defendant had always been ready and willing to pay, and brought into Court the amount of the composition on the plaintiff's debt ready to be paid to him.—*Held*, that the plea was bad for not shewing a payment or tender within the fourteen days. *Hazard v. Mare*, 434

- (3). *Notice of Act of Bankruptcy.*

Notice to an execution creditor that his debtor has filed a petition for arrangement under the 76th

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section of the Bankrupt Law Consolidation Act, 1849, is notice of an act of bankruptcy within the meaning of the 133rd section, provided an adjudication of bankruptcy is filed within two months after the petition for arrangement is dismissed. *Edwards and Another, Assignees, v. Gabriel*, 701

- (4). *Privilege from Arrest*—12 & 13 Vict. c. 109, s. 257.

F. having been adjudicated bankrupt, and having surrendered, the 6th of November was appointed for his last examination. At this meeting his examination was proceeded with, and the meeting was *adjourned to the 3rd of December*. The bankrupt was not imprisoned or in custody at the date of the adjudication. *On the 1st of December he was arrested* under a writ of ca. sa. issued out of this Court, founded upon a certificate granted by a Commissioner, under the 257th section of the Bankrupt Law Consolidation Act, 1849.—*Held*, that he was protected from arrest by the 112th section of that Act, and the Court therefore discharged him.

A bankrupt arrested under a writ of ca. sa., when privileged from arrest under the 112th section, is entitled to be discharged from custody, and cannot be detained under a writ of ca. sa. lodged with the sheriff after the period of protection has expired. *Dubitante Martin, B. Ockford v. Preston*.—*Chapman v. Preston*, 466

See Costs (3).

BASTARD.

See CONVEYANCE, FRAUDULENT.

BEER.

The 3 & 4 Vict. c. 61, s. 13, which

imposes a penalty on persons selling beer by retail without a license, applies to persons selling beer at one penny halfpenny the quart. *Read, Appellant, Storey, Respondent,* 423

BILL OF EXCHANGE.

Notice of Dishonour—Effect of Admission—Liability in Absence of.

If a party who has not had due notice of the dishonour of a bill of exchange thinks fit to acknowledge his liability, though he does so to a party other than the person who afterwards sues upon the bill, that acknowledgment is sufficient to enable the latter to maintain an action on the bill.

A. indorsed a bill to B., who indorsed the same to C. A. had no notice of dishonour. C. brought an action on the bill against both A. and B., who allowed judgment to go by default. B. paid the bill and sued A.—*Held*, that A., having acknowledged his liability on the bill by suffering judgment by default in an action by C., could not set up the want of a notice of dishonour as an answer to an action by B. *Rabey v. Gilbert,* 536

BILL OF LADING.

See SHIPPING (2.)

BILL OF SALE.

A bill of sale by way of mortgage of personal chattels, if executed as a security for money actually lent, is not fraudulent and void within the 18 Eliz. c. 5, though its object is to defeat the expected execution of a judgment creditor.

BUILDING SOCIETY.

The registration, under the 17 19 Vict. c. 36, of a bill of sale as the day of its execution, is not invalidated by reason of the consideration money not having been paid nor the deed attested, until ten days after the execution. *Derrill Terry,* 84

BROKER.

See AGENT.

BUILDING SOCIETY.

Action by Surveyor against Directors—Contract for Payment "of the Funds of the Society."

The plaintiff was surveyor to Benefit Building Society, of which the defendant was one of the managing directors. By a Rule of the Society, it was declared that its object was to advance money to its members to enable them to buy or build houses. By another Rule, the surveyor shall examine and report upon houses and other property "previous to money being advanced thereon by the Society, and shall transact all other business of the Society, &c., for which he shall receive out of the funds thereof fair and reasonable remuneration. The directors took on lease a piece of land on which they covenanted to build six houses. At a meeting of the directors, at which the defendant was present, it was resolved that the plaintiff be instructed to prepare plans and specifications for the houses. At another meeting it was resolved that the plaintiff be paid commission of 3½ per cent. on the outlay. The plaintiff prepared the plans and specifications and superintended the building, but before

was finished the Society became insolvent. The plaintiff made several applications "to the directors of the Society" for payment of his commission, but without success, and, the Society having become extinct, he brought an action against the defendant.—*Held*, that the contract was not with the defendant personally but with the Society, and that the plaintiff's only right to remuneration was out of the Society's funds: Per *Pollock*, C. B., *Martin*, B., and *Channell*, B. *Bramwell*, B., dissentiente. *Alexander v. Worman*, 100

CANAL ACT.

Construction of—Right of Fishing.

The 87th section of the 50 Geo. 3, c. cxxii., which incorporated certain persons for the purpose of making a canal, enacts that the lord of every manor through which the canal, collateral cut, and reservoirs shall be made, "shall have and be entitled to the right of fishery of and in so much of the said canal, cut and reservoirs as shall be made in, over, or through the common or waste lands within his manor, and over or through any other lands or grounds, in the waters whereof such lord now hath the right of fishery; and that the owner of any other lands through which the said canal and collateral cut shall be made, shall also have and be entitled to the like right of fishery of and in so much of the said canal or collateral cut as shall be made in, over, or through his lands."

Held:—First, that "commons or waste lands" meant commonable lands, the ownership of the soil of which was in the lord of the manor, and not open fields over which certain persons had rights in severalty.

Secondly.—That the right of the

lord, as owner of the land through which the canal was made, was limited to fishing in the canal and collateral cut, excluding the reservoir. *The Grand Union Canal Company v. Ashby*, 394

CARRIER.

- (1). *Carriers' Act*, 11 Geo. 4 & 1 Wm. 4, c. 68—*Liability where Increased Charge not paid.*

Where a carrier receives goods of the description mentioned in the 11 Geo. 4 & 1 Wm. 4, c. 68, and the person delivering the same has declared their value and nature, he is not bound to tender, but the carrier must demand, the increased charge mentioned on the notice affixed in his office, warehouse or receiving house, whether the goods are there delivered or to a servant sent to fetch them; and if no such demand is made the carrier is liable for the loss of or injury to the goods, although the increased charge has not been paid. *Behrens v. The Great Northern Railway Company*, 366

- (2). *By Railway.*

See RAILWAY COMPANY.

"CAUSE OF ACTION."

See COUNTY COURT.

CHARTER PARTY.

Construction of—Time for Payment of Freight.

A charter party stipulated that

the ship should load a cargo of coal at Cardiff and proceed to Pernambuco and there deliver the same, and afterwards receive a full cargo of sugar and other merchandise, and therewith proceed to a safe port in the United Kingdom, and deliver the same on being paid freight at the rate of 60s. per ton of 20 cwt. nett for sugar, and for other produce at a rate proportionate thereto, being in full for the round. "The freight to be paid in the following manner:—150l. on signing bills of lading at Cardiff, cash for disbursements abroad at the current rate of exchange, and the remainder on the delivery of the cargo. The master to sign bills for each cargo at any rate of freight that might be tendered. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft on charterers, at usance, which they agreed to accept and pay on consignee at loading port agreeing amount."—*Held*, that the two clauses were not inconsistent, their meaning being that if the bill of lading freight was less than the charter freight, the difference was to be paid at the port of loading by the captain's draft on the charterers, at usance, if the consignee settled the amount, otherwise at the port of delivery. *Santos v. Brice*, 290

COMMITMENT.

By Judge of Assize.

A Court of assize is a superior Court; and consequently, in a warrant of commitment by a Judge of assize for contempt, the adjudication

of contempt may be general, and the particular circumstances need not be set out. *In re Fernandes*, 71

COMMON LAW PROCEDURE ACT, 1852.

Sect. 58—Ejectment.

The 58th section of the Common Law Procedure Act, 1852, which enacts that "a plaintiff shall be deemed out of Court, unless he declare within one year after the writ of summons is returnable," does not apply to the action of ejectment. *Scope v. Paddison*, 64

COMMON LAW PROCEDURE ACT, 1854.

(1). *Sect. 3, Arbitration—Power of Judge at Nisi Prius.*

A Judge at Nisi Prius has no power under the Common Law Procedure Act, 1854, to order a compulsory reference of matters in account, since the 3rd section of that Act only applies to a reference before trial, and the 6th section to a reference by a Judge on a trial without a jury. *Robson v. Lees*, 25

(2). *Sections 34, 35.**See APPEAL.*(3). *Sect. 51—Interrogatories—What Allowable.*

In an action for libel, the Court will not permit the plaintiff to exhibit interrogatories to the defendant the answers to which, if in the affirmative, would tend to shew that he composed or published the libel, an

would therefore criminate him. *Tupling v. Ward*, 749

(4). *Interrogatories—Before Declaration.*

In an action for infringement of a patent, the Court refused to allow the plaintiff to administer interrogatories to the defendant before declaration, it appearing that the cause of action arose more than six years before the action was commenced. *Jones v. Pratt*, 697

(5). *Sect. 61—Attachment of Debt.*

Where judgment is recovered against an executor, a debt due from a third person to the testator's estate may be attached under the garnishment clauses of the Common Law Procedure Act, 1854, and it is no answer that a decree has been made in a suit in Chancery for the administration of the testator's estate. *Burton v. Roberts, Parker, Garnishee*, 93

A judgment creditor, who has taken his debtor in execution under a ca. sa., cannot attach his debts under the garnishment clauses of the Common Law Procedure Act, 1854. *Jauralde v. Parker*, 431

CONTEMPT.

See COMMITMENT.

CONTRACT.

(1). *Evidence of.*

The master of a steam-tug, of which the defendants were owners, was employed by the plaintiff to tow his smack out of a harbour. In so doing the smack was stranded through the alleged negligence of the master. The plaintiff had on

previous occasions hired the defendants' steam-tug, and on paying the charge had received a receipt, upon the back of which was printed a notice that the defendants would not be answerable for damage occasioned by any supposed negligence of their servants.—*Held*, that it was a question for the jury whether the contract was made on the terms printed on the back of the receipts. *Symonds v. Pain*, 709

(2). *Consideration—Sufficiency of—Doing an act which a Party was already bound to do by Contract with another.*

The performance of an act which a person has agreed with another to perform, is a good consideration to support a contract with a third person if the latter derives a benefit from the performance.

Therefore where a declaration stated that, in consideration that the plaintiff would deliver to the defendant a cargo of coals on board the plaintiff's ship, the defendant promised to discharge the same at the rate of forty-nine tons a-day:—*Held*, that a plea was no answer which stated that the plaintiffs had made a previous contract with other persons for the delivery of the coals to their order in the same way, and they ordered the delivery to the defendant. *Scotson v. Pegg*, 295

(3). *Evidence of Custom to explain.*

Upon the sale, by one broker to another, of shares in a mine, they respectively signed bought and sold notes, the former of which was as follows:—"Bought, T. F. 250/5120ths shares in Wheal Charlotte, at 2l. 5s. per share, 562l. 10s. for payment, half in two months, and half in four months. In an action for not accepting the shares:—*Held*, that evi-

dence was admissible of a custom among brokers in mining shares, that, in contracts relating to the sale and purchase of such shares, the delivery takes place at the time appointed for payment. *Field v. Lelean*, 617

(4). *Construction of—By Partnership—to employ Agent.—Death of Partner.*

A declaration stated that by agreement in writing between B., since deceased, and the defendant, of the one part, and the plaintiff of the other part, B. and the defendant, who at the date of the agreement were carrying on business as stone merchants in copartnership, appointed the plaintiff their sole London agent for a period of four years and a half, and the plaintiff in consideration of the premises agreed to accept the said appointment upon the terms (amongst others) that B. and the defendant should pay the plaintiff 2l. 10s. per cent. on all accounts received by them for stone sold by the plaintiff, or supplied by B. and the defendant to any person originally introduced to them by the plaintiff. Breach: that the defendant did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half, and did not nor would execute certain orders for stone procured by the plaintiff in his said capacity of agent. On demurrer: *Held*, that the parties contracted with reference to the then existing partnership business, and that the contract was to employ the plaintiff for a period of four years and a half, subject to the condition that all parties so long lived. Per *Channell, B.*, and *Wilde, B.* *Martin, B.*, dubitante.

Quære, whether the case falls within the principle of those cases in which, the personal skill of the party being

involved, the contract was put an end to by death. *Tasker v. Shepherd*, 575

(5). *Evidence of.*

See ACCORD.

INSURANCE, MARINE (1).

(6). *Statute of Frauds, s. 17.*

See SALE OF GOODS.

(7). *When implied by Law.*

See EXECUTOR.

(8). *When not Implied.*

See PLEADING.

(9). *Consideration.*

See GUARANTEE.

(10). *Evidence of Custom.*

See INSURANCE, MARINE (2.)

(11). *Privity of.*

See BANKER.

(12). *Effect of Execution of, under Mistake.*

See MISTAKE.

(13). *Evidence of Rescission of.*

See MARRIAGE.

CONTRACTOR.

Liability of Railway Company for Imperfect Execution of Work by.

The defendants, a railway Company, were authorized by their act of parliament to construct a railway bridge across a navigable river. The Act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge and for opening it

to admit such vessel. The defendants employed a contractor to construct the bridge in conformity with the provisions of the act of parliament, but before the works were completed the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river.—*Held*, that the defendants were liable for the damage thereby caused to the plaintiff. *Hole v. The Sittingbourne and Sheerness Railway Company*, 488

CONVEYANCE.

Fraudulent—27 Eliz. c. 4.

D., a widow, being possessed of certain real property, by settlement in contemplation of her marriage, dated the 17th May, 1830, reciting that, upon the treaty for the marriage, it was agreed that her property should be appointed, released and conveyed as thereafter mentioned, limited the property to trustees in trust for herself for life, with remainder, as to part, to her husband for life, remainder to the use of her illegitimate son, the plaintiff, in fee, and as to the residue to the plaintiff in fee, in case he should attain the age of twenty-one years, &c. She and her husband subsequently mortgaged the property. In ejectment by the plaintiff against a person claiming title under the mortgagee, it was proved that in October, 1830, the husband and wife let the property to T., and received the rents of it for some years. The plaintiff gave secondary evidence of the above settlement, which was afterwards put in by the defendant.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer): First, that the limitation in the marriage settlement to the plaintiff, though a bastard, was not fraudulent

and void as against the mortgagee by the 27 Eliz. c. 4. Dissentiente *Williams, J.*

Per *Cockburn, C. J.*, and *Wightman, J.*—Because although the limitation in the marriage settlement to the illegitimate son of the wife, being the settlor, could not be deemed within the consideration of the marriage and was therefore voluntary, yet the case came within the principle of the exception engrafted upon the rule, viz. that a provision in a marriage settlement in favour of existing children cannot be deemed fraudulent within the statute 27 Eliz. c. 4.

Per *Blackburn, J.*—Because the limitation so interfered with those which would naturally be made in favour of the husband, wife and issue, that it must be presumed to have been agreed upon by all parties as part of the marriage bargain that the estate should be so settled.

Secondly: that there was evidence of the seisin of D. at the time of the execution of the settlement: Per *totam Curiam. Clarke v. Wright*, 849

(2). To Defeat Execution.

See BILL OF SALE.

CONVICTION.

See ASSAULT,
SERVANT.

COPYHOLD.

(1). Custom in, to take Clay.

A custom in a manor, that the copyholders of inheritance may, without licence from the lord of the manor, break the surface and dig and get clay without limit in, upon and from and out of their copyhold tenements, for the purpose of making



bricks to be sold by them off the manor, is good in law. *The Marquis of Salisbury v. Gladstone*, 128

(2). *Fine—Description of Premises in Surrender—Evidence of Admission.*

A lord of a manor cannot recover a fine not certain, unless it is reasonable, and assessed and demanded.

A surrenderee of copyhold premises has a right to have in his admittance a description of the premises corresponding with that in the surrender.

An entry by a steward of a manor in his book of the admission of a surrenderee of copyhold premises is a mere memorandum, and not such an admittance as will entitle the lord to claim a fine. *Hayward v. Raw and Bates*. *Hayward v. Cruden*, 308

CORONER.

A deputy coroner appointed under the 6 & 7 Vict. c. 83, is privileged from arrest while preparing to hold an inquest. *Ex parte The Deputy Coroner of Middlesex*, 501

CORPORATION.

Municipal—Liability for Negligence—Baths and Washhouses.

The defendants, a body corporate, erected baths and washhouses under the provisions of the 9 & 10 Vict. c. 74. This Act vests the property in the baths and washhouses in the corporation, but their management in the town council. For the purpose of drying clothes, there was a wringing machine, which consisted of a cylinder into which the wet clothes were put, and which was made to revolve with great rapidity by steam power. This machine was originally constructed to be worked by hand

by means of an ordinary handle. In applying steam this handle was removed, but a rod to which it had been affixed was unnecessarily allowed to remain. The plaintiff, who had paid for the machine to wash, was using this machine when the iron rod caught the sleeve of her gown, and she was dragged down by the machine and severely injured without any negligence on her part. When it was proposed to apply for power to the machine, the defendants were told of its danger.—*Hale v. The Mayor of Sunderland*. The defendants, by availing themselves of the provisions of the 17 & 18 Vict. c. 74, had undertaken a statutory duty which bound them to exercise ordinary care and diligence in providing machines reasonably fit for use, and that they, and the town council, were liable for the injury sustained by the plaintiff.

CORRUPT PRACTICE.

17 & 18 VICT. c. 18

See EVIDENCE (1).

COSTS.

(1). 23 & 24 Vict. c. 126, s. 8 *Bringing Actions.*

The 23 & 24 Vict. c. 126, which provides that when a plaintiff in any action for an alleged tort recovers by the verdict of a jury more than 5*l.*, he shall not be entitled to any costs, if the Judge certifies that he is satisfied that the plaintiff is entitled to them, enables the Judge to certify in an action on the case before the passing of that Act. *Hale*,

(2). *In Action on Judgment u*

The bringing an action on the case under 20*l.* with the object of obtaining a judgment above

issuing thereon execution against the person, is an evasion of the 7 & 8 Vict. c. 96, s. 57, and the Court, in the exercise of their discretion, under the 43 Geo. 3, c. 46, s. 4, will not allow the plaintiff his costs. *Adams v. Ready*, 261

- (3). *Bankrupt Law Consolidation Act, 1849, s. 86.*

The 86th section of the Bankrupt Law Consolidation Act (which entitles a defendant to costs where the plaintiff fails to recover the amount for which he has filed an affidavit of debt), does not apply to cases where the action has been removed by the defendant from an inferior Court. *Woodall v. Voigt*, 153

- (4). *County Court—Concurrent jurisdiction—9 & 10 Vict. c. 95, s. 128—Where a public Company “dwells.”*

The Great Western Railway Company has its principal station at Paddington, where the directors meet, the secretary resides, general meetings are held, and whence orders emanate.—*Held*, that the Company “dwells” at Paddington within the meaning of that word in the 9 & 10 Vict. c. 95, s. 128; and consequently that, where a plaintiff in an action against the Company dwelt more than twenty miles from Paddington, the superior Court had concurrent jurisdiction. *Adams v. The Great Western Railway Company*, 404

- (5). *Security for.*

See PRACTICE (2).

- (6). *On Appeal from County Court.*

See APPEAL (2).

COUNTY COURT.

- (1). *Jurisdiction—“Whole Cause of Action.”*

The plaintiff went to the defendant's residence, which was beyond the jurisdiction of a particular County Court, and there verbally agreed to purchase of him a horse for 28*l.*, to be delivered on the following day at the plaintiff's residence which was within the jurisdiction of that County Court. On that day the defendant brought the horse to the plaintiff's residence, when he required a warranty which was given and the price paid. The plaintiff afterwards sued the defendant in the County Court for a breach of the warranty:—*Held*, that there was no complete contract until the warranty was given, and consequently the “whole cause of action” arose within the jurisdiction of the County Court. *In the Matter of Aris v. Orchard*, 160

- (2). *9 & 10 Vict. c. 95, s. 48—Treasurer's Right of Access to Books.*

A registrar of a County Court rented offices in which he carried on his business as a solicitor and also the County Court business, he being allowed by the Treasury an annual sum for the part of the offices used for County Court purposes. The treasurer of the County Court gave the registrar notice of his intention to audit the accounts on a Saturday, when, by a County Court Rule, the office closed at one o'clock. The treasurer went to the office after one o'clock, and finding it closed, broke the locks of an inner door and a cupboard in which the books were kept, and having taken away the books and audited them, returned them to the office. The registrar having

brought an action of trespass against him:—*Held*, that he was justified in so doing under the County Court Acts. *Burridge v. Nicholls*, 383

(3). *Appeal*—13 & 14 *Vict. c. 61, s. 14*.

On the trial of a cause before the judge of a County Court and a jury, the jury found a special verdict, on which the County Court judge entered the verdict for the defendant, giving leave to the plaintiff to move to enter a verdict or for a new trial. The application was subsequently made and refused.—*Held*, that, under the 13 & 14 *Vict. c. 61, s. 14*, the plaintiff had a right of appeal from the decision of the judge in refusing to enter a verdict or for a new trial. *Foster v. Green*, 793

(4). 9 & 10 *Vict. c. 128*—*Where Public Company "dwells."*

See COSTS.

COURT OF ASSIZE.

See COMMITMENT.

COVENANT.

By Assignee of Reversion by Estoppel.

An assignee of the reversion may establish his title against the lessee by way of estoppel.

J. B., being mortgagor in possession, on the 22nd of February, 1848, by indenture, executed by him and the defendant, demised to the defendant certain premises for seven years, and the defendant covenanted to repair. On the 2nd of February, 1854, J. B. executed an indenture, whereby, after reciting the mortgage and that he had sold the equity of redemption to the plaintiff, he "granted, bargained and sold, aliened, released and surrendered the pre-

mises, and all his estate, title, both at law and in therein, to the plaintiff," plaintiff sued the defendant for breach of the covenant. The declaration, after stating the lease and covenant, alleged that by deed assigned the premises to the plaintiff, whereby the defendant, subject to the terms of the lease, vested in the plaintiff. The defendant pleaded that he did not assign the premises to the plaintiff; nor had he at the time of making the lease any reversion in the premises; nor was the plaintiff:—*Held*, by the Court of Exchequer Chamber (on the judgment of the Court of Exchequer), that the plaintiff was entitled to have the verdict entered for him: that the defendant was estopped from denying that the lessor had such a legal estate as would warrant the lease, as no other legal estate or interest was shewn to have been in the premises; and that the plaintiff must be taken as against the defendant by estoppel, that the lessor had a legal estate in fee. *Cuthbertson v. Cuthbertson*.

CUSTOM.

Validity of.

See COPYHOLD.

DAMAGE.

When too Remote.

See FALSE REPRESENTATION.

DAMAGES.

(1). *Measure of*—*For Non-compliance with Contract.*

The defendant, on the 26th

sold by sample to the plaintiff 3000 gallons of naphtha, at 2s. 2d. On the 27th the plaintiff resold the same to one H., also by sample, at 2s. 6d. It appeared that the sample contained 73 per cent. of benzol, an article used in the manufacture of Magenta dye then newly discovered, and for that purpose was worth 5s. 9d. per gallon. The defendants failed to deliver the naphtha. It was proved that H. had claimed the difference between 5s. 9d. and 2s. 6d. from the plaintiff. In assessing damages for the non-delivery of the naphtha the jury gave this amount to the plaintiff as damages.—*Held*, that there must be a new inquiry, because it did not appear at what price the plaintiff could have procured naphtha according to the sample at the time of the breach.

On a second inquiry it appeared that naphtha known to contain 73 per cent. of benzol could not have been bought for less than 5s. 9d. at the time of the breach. The learned Judge, before whom the inquiry was executed, told the jury that the plaintiff would have no answer to an action by H. for the difference, and advised the jury to give such a sum as would enable him to pay H. The jury having given this amount:—*Held*, that the damages were rightly assessed, and that there was no misdirection. *Josling v. Irving*, 512

(2). *Measure of, in Action against Carrier for Non-delivery of Goods.*

The plaintiffs delivered to the defendants, who were carriers, ten tons of cotton to be carried from Liverpool to Oldham. In the usual course the cotton should have been received on the following day, but it did not in fact arrive till four days afterwards. In consequence of the

delay a new mill of the plaintiffs was stopped for want of cotton to go on with. At the time of the delivery of the cotton to the defendants nothing was said as to the particular inconvenience likely to result from the delay in forwarding it. But on the day before it was delivered to the defendants, and repeatedly on each succeeding day until it arrived at Oldham, one of the plaintiffs called to inquire about it; and on each occasion told the manager of the goods department at the Oldham station that the mill was at a stand, solely on account of the non-delivery of the cotton. In an action against the defendants for neglect in delivering the cotton, the plaintiffs proved that during the time the mill was at a stand they had paid in wages 7l.; and that the profit which would have been made if the mill had been at work was 7l. 10s. The judge of the County Court told the jury, that when, as in the present case, by the neglect of a carrier, a man had no material to carry on his business, he had a right to charge as legal damage such loss as naturally and immediately arose from stopping the mill; that the plaintiffs were entitled to the money they had actually paid as wages, 7l., and that the profit which the plaintiffs would have made was a fair subject of calculation; and the jury should therefore give, over and above the sum of 7l., such amount as would be the actual loss and detriment the plaintiffs had suffered by the non-arrival of the cotton in due course.—*Held*, that this was a misdirection, and that the plaintiffs were not entitled to the amount of wages paid and of the profits lost as *legal damages*, inasmuch as it assumed that the stoppage of the mill arose entirely from the non-delivery of the cotton, when in fact it arose partly from that and partly

from the plaintiffs having no cotton to go on with.

Semble, that the jury might have properly given the amount of the wages and loss of profit as damages, if they had found as a fact that the stoppage of the mill was a consequence of the non-delivery of the cotton which, either from express notice or the course of business in the district, might have been anticipated by the parties at the time of making the contract.

Quere, per *Bramwell*, B., whether if, in the course of the performance of a contract, one party gives notice to the other of any particular consequence which will result from a breach of the contract, and the latter, after that notice, persists in breaking the contract, the former may not hold him responsible in damage for the consequences if they result from the breach, though they are not such as would naturally arise, and were not in contemplation of the parties at the time of the contract. *Gee, Appellant, v. Lancashire and Yorkshire Railway Company, Respondents*, 211

(3). Exemplary.

In an action for wilful negligence, the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff's rights and convenience, the jury may give exemplary damages. *Emblen v. Myers*, 54

(4). Measure of.

See MINING.
WATERWORKS.

DEATH.

Of Partner, Effect of.

See CONTRACT.

DISTRESS.

DEVISE.

See WILL.

DISTRESS.

(1). Abuse of, by Distrainer—Right of Distraintee to retake.

If a distrainer takes the distress out of the place where it was originally impounded, for the purpose making an unlawful use of it, the owner may interfere and take it out of his possession without rendering himself liable either for a rescue or pound breach.

The plaintiffs, the owners of a colliery, having distrained two horses belonging to the defendant for rent in arrear from one H., the lessee of the colliery, impounded them in the stable of an inn about half a mile from the pit. Two days afterwards the plaintiffs' servant brought the horses to the colliery for the purpose of letting them down into the pit where they had been accustomed to work. One of the horses was placed in a moveable stable near the pit mouth and the other in a skip ready to be let down into the pit. The defendant then forcibly took away both horses:—*Held*, that the distrainer having misused the distress, the defendant was at liberty to retake the property without being liable for rescue or pound breach. *Smith v. Wright*, 8

(2). Indemnity to Broker.

A landlord signed a warrant of distress in the following form:—'I hereby authorize R. I., or his agent as my agent, to seize and distrain the goods on the premises, now in the possession of M. G., for the amount of rent due to me and for your so doing this shall be your sufficient warrant, authori-

and indemnification against all costs and charges in respect to any law expenses, action or actions that may arise, as well as any other and all charges or expenses which you or your agent may be at or brought against you or your agent on this account." W. H., the servant of R. I., having distrained, an action of trover was brought against him by the tenant for the conversion of certain goods, some of which were alleged not to have been in the inventory, in which action the plaintiff was nonsuited.—*Held*, that, assuming that W. H. had done nothing wrong, the indemnity extended to the costs of defending the action brought against him. *Ibbett v. De La Salle*, 233

DOMICILE.

Officer in Service of East India Company residing in England.

P., who was the son of Irish parents and an officer in the military service of the East India Company, on the Bombay Establishment, returned to England in 1840, having attained the regimental rank of colonel. By the regulations of the service officers who have attained that rank were permitted to reside where they pleased subject to the Company's orders for their return to duty in India. P. continued in the service of the Company until his death. In 1841 he was appointed by her Majesty as Plenipotentiary in China, and accepted this appointment with consent of the East India Company. On his return in 1844, having been made a Privy Councillor, he purchased the ground lease of a house in Eaton Place, which he furnished and fitted up for his residence and resided there. Soon afterwards he was appointed Governor of

the Cape of Good Hope, where he continued until 1848, when he was appointed Governor of Madras. He resided at Madras until 1854 when he returned to his house in Eaton Place, but afterwards went to other places in England and ultimately to Malta, where he died. In his will and codicils he described himself as "of Eaton Place." During the last period of his life he frequently declared his intention of returning to India.—*Held*, that the fact that P. continued in the service of the Company and was liable to be ordered to return to India did not prevent him from acquiring an English domicile on his return from China: that his subsequent residence as Governor at the Cape of Good Hope and at Madras did not involve the loss of his English domicile; and that, as he had acquired an English domicile on his return from China in 1844, subsequent expressions of intention to return to India, and even the going to Malta with the view of ultimately returning there, did not affect the domicile he had acquired in England. *The Attorney General v. Pottinger*, 733

DOUBLE VALUE.

Action for.

See LANDLORD AND TENANT.

EASEMENT.

On Highway.

See HIGHWAY.

EJECTMENT.

See COMMON LAW PROCEDURE ACT, 1852.

ELECTION, PARLIAMEN- TARY.

Evidence of Fact of.

See EVIDENCE (1).

ESTOPPEL.

(1). *By Recital—Construction of Recital.*

Declaration on a bond, conditioned for the due performance by the defendant of a contract to execute certain railway works according to a specification. Breach: that the defendant did not complete three tunnels according to the specification.

Plea (by way of estoppel): that before the suit, by another deed, it was declared that, with certain exceptions therein mentioned not relating to the causes of action, the defendant and the plaintiffs had adjusted and mutually satisfied every other claim or demand which the said parties then had against each other, as the plaintiffs and the defendant did by the said deed severally admit.

Replication: Setting out the deed which, after reciting the contract to execute the railway works, and a provision therein for the reference to arbitration in case the defendant should be hindered in the execution of the works by the plaintiffs or their engineers; and that the plaintiffs had made out an account containing a variety of matters in respect of which they claimed compensation, a copy whereof was contained in a schedule to the deed, further recited: *that, with the exception of the claims contained in the schedule, S. E. R. Company (the plaintiffs) and C. W. (the defendant) had settled, adjusted, and mutually satisfied every other account, claim or demand*

*which the parties had against each other arising out of the said contract as the said S. E. R. Company and C. W. did thereby severally admit or acknowledge; but the claims of the said C. W., set forth in the schedule were disputed; and that it had been agreed that the claims of C. W. the schedule should be referred to the award of G. W.: Witnesses that the parties covenanted to abide by the award of G. W.; that the submission should not be defeated by the death of the parties, and that the costs should be in the discretion of the arbitrators, &c.—Held, that there was no estoppel; that by the true meaning of the deed the arbitrators were confined to the matters mentioned in the schedule, and that the admission was made for the purpose of the reference only. *The South Eastern Railway Company v. Warton*, 52*

(2). *Assignment of Reversion by.*

See COVENANT.

EVICITION.

Evidence of.

See LANDLORD AND TENANT (4).

EVIDENCE.

(1). *Documentary—Register of Voters—Writ and Return of Election.*

The register of voters at a parliamentary election, made in pursuance of the 48th and 49th sections of the 6 & 7 Vict. c. 18, is a document of such a public nature as to be admissible in evidence upon its mere production by the returning officer, and therefore an examine or certified copy of it is also admissible.

Seem that, in an action for penalties under the Corrupt Practices at Elections Act, 1854, parol evidence of an election having taken place is not sufficient without proof of the writ, return, and register.

In an action for penalties, under the Corrupt Practices at Elections Act, 1854 (17 & 18 Vict. c. 102), the plaintiff gave in evidence a copy of the writ and return from the office of the clerk of the Crown certified by a *clerk in the office* to be a true copy of the original writ and examined therewith. The defendant's counsel having allowed it to be given in evidence as a certified copy.—*Held*, that, assuming it was not, there was no ground for granting a new trial. *Reed v. Lamb*, 75

(2.) *Presumption of Assignment—Where Instrument of Assignment inadmissible for want of Stamp.*

In an action by the assignees of D. a bankrupt against L., it appeared that D., before his bankruptcy, being indebted to B., at the request of the agent of B., verbally promised to give B. an order on the defendant who was indebted to him. D. then gave to B. an order (unstamped) as follows:—"D. to B. Debtor. To balance of account 23*l*. Mr. L. Please to pay the above account and charge it to our account as paid. 20th October, 1857." The defendant then gave the following document to B.:—"Mr. B. I agree to pay you cash as per order of D." D. subsequently became bankrupt, and the defendant, after the bankruptcy, paid the 23*l*. to B.—*Held*, that, the order being inadmissible for want of a stamp, there was no evidence of an equitable assignment of the debt, so as to entitle the defendant to credit for the payment made by him after the bankruptcy. *Pott v. Lomas*, 529

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(3). *Admissions—Effect of.*

See SHIPPING (1).

(4). *Of Appointment and Authority of Ship's-husband.*

See SHIPPING (1).

(5). *Of Admission of Copyholder—Entry in Book of Steward of Manor.*

See COPYHOLD (2).

(6). *Time for objecting to.*

See PLEADING (4).

See also LANDLORD AND TENANT (2), (5).

EXECUTION.

(1). *By Fi. Fa.—Against Bailee of Goods.*

See SHERIFF.

(2). *Ca. Sa.—Detainer against Party privileged from Arrest.*

See BANKRUPTCY (4).

EXECUTOR.

Of Innkeeper—Liability for Loss of Goods of Guest in Lifetime of Testator.

Wherever a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or a jury may infer, a promise by each party to do what is to be done by him.

Therefore an action may be maintained against the executors of an innkeeper on his implied promise to keep safely and without diminution the goods of his guest.

The executors are also liable in "tort," the loss of the goods being a wrong committed within the meaning of the 3 & 4 Wm. 4, c. 42, s. 2. *Morgan v. Ravey*, 265

EXCH.

EXTORTION.

See MONEY HAD AND RECEIVED.

FALSE REPRESENTATION.

To induce a Plaintiff not to call a Witness—Damage—When too remote.

A declaration alleged that the plaintiff, defendant and C. had entered into a joint speculation in railway shares: that C. had advanced 6000*l.*; 2000*l.* on his own behalf, 2000*l.* as a loan to the plaintiff, and 2000*l.* on behalf of the defendant: that C. was desirous of retiring from the adventure, and the defendant offered to take upon himself the whole of the adventure and debt of 6000*l.* provided the plaintiff would consent to abandon his share to the defendant, and C. would accept the defendant as his debtor in the place of the plaintiff for the said sum of 2000*l.*: that the plaintiff did abandon his share of the adventure to the defendant, and the defendant agreed to take upon himself the whole adventure and become debtor to C. for the whole 6000*l.*; and C., on the faith and in the belief that such an arrangement was made, consented to accept the plaintiff as such debtor in the place of the plaintiff; nevertheless the defendant, knowing that he alone was capable of proving that the plaintiff had assented to the said arrangement, fraudulently, falsely and maliciously, and before the Evidence Act, 14 & 15 Vict. c. 99, and in order to induce C. to believe that the said joint adventure had never been put an end to, and to induce C. to sue the plaintiff for the 2000*l.*, and to deter the plaintiff from calling the defendant as a witness, and to destroy his credit as a witness if so called, wrote and sent to C. a letter purporting to be addressed to the plaintiff, but directed to C., wherein

he fraudulently and falsely pretended to expostulate with the plaintiff, & asserted that the plaintiff had positively refused to concur in the said arrangement. By means whereof C. was induced to and did believe that the plaintiff had never agreed to retire from the said adventure and acting on such behalf C. brought an action against the plaintiff to recover the 2000*l.*; that the said action was referred to an arbitrator upon the terms that neither plaintiff nor the defendant should be examined; and C. recovered against the plaintiff 2486*l.*, which he was compelled to pay.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the declaration was bad, since it did not appear that the damage to the plaintiff was a natural result of the wrongful act of the defendant. *Collins v. Dove*, 1

FOREIGN JUDGMENT.

When Impeachable.

The judgment of a foreign Court having jurisdiction over the part and subject-matter of the suit, cannot be impeached on the ground that it is erroneous upon the merits. *De Cesse Brissac v. Rathbone*, 3

FRAUDS, STATUTE OF.

(1). *Sect. 4.*

See ACCORD.

(2). *Sect. 17.*

See SALE OF GOODS.

FRAUDULENT CONVEYANCE.

What is.

*See BASTARD.
BILL OF SALE.*

GAS COMPANY.

FREIGHT.

See CHARTER-PARTY.
SHIPPING.

GAS COMPANY.

"Suffering" Washings to Pollute Water.

The 6 Geo. 4, c. lxxix., incorporated a Company for the purpose of supplying the town of Birmingham with gas. By the 8 & 9 Vict. c. lxvi. s. 160, it is enacted, "That if the Company shall at any time cause or suffer to be conveyed or to flow into any stream, reservoir, aqueduct, pond or place for water, within the limits of the said Act, any washing, substance or thing which shall be produced by making or supplying gas," they shall forfeit 200*l*. In 1854 the Company erected a gas tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the Company, and the tank was erected on solid sandstone and with proper materials. The Company knew that mines in the neighbourhood had been worked, but they did not know that mines had been worked under or near to any part of their land. In 1838 there were workings under half the Company's land, and from 1848 to 1855 these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water in it unfit for domestic purposes.—*Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the Company had suffered the washings to flow into the plaintiff's well within the meaning of the

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HIGHWAY.

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8 & 9 Vict. c. lxvi., and consequently were liable to the penalty of 200*l*. *Hipkins v. The Birmingham and Staffordshire Gas Light Company*, 250

GUARANTEE.

Consideration.

P. being indebted to the plaintiffs, the defendants gave them the following guarantee:—"In consideration of your agreeing, at our request, from time to time to supply on credit to P. such goods as he may require and you may think fit to supply, we do hereby guarantee to you the payment of such sum as he now owes and may at any time, from time to time, owe to you.—*Held*, that the guarantee did not contain any binding agreement on the part of the plaintiffs to supply goods to P., and that, as they never did supply any goods to P. after the date of the guarantee, the defendants did not become liable to pay the existing debt of P. *Westhead v. Sproson*, 728

HIGHWAY.

Dedication subject to pre-existing Right of User.

The corporation of Yarmouth are, and have been since the time of King John, owners of the soil of the South Quay in that borough. The quay is bounded on the east by houses, and on the west by Yarmouth Haven. From the time of King Charles the First, there has been a common and public highway over the quay; and so far back as living memory, the occupiers of some of the houses have used a part of the quay fronting them for depositing thereon anchors, timber, boats and other incumbrances. Such user was in fact enjoyed, as of right, for more than twenty years, but not immemo-

RICH.

rially; and though it caused some inconvenience to the public it did not produce an actual obstruction of the highway. By the rolls of the Court Leet of the borough, from the year 1632 to 1653, it appeared that many persons had been amerced for "overburdening" the quay with anchors, timber, blocks, &c., and thereby obstructing the highway. An occupier of one of the houses, in the exercise of an alleged right, placed upon a part of the quay in front of his house, anchors, timber and other incumbrances, whereby the free use of the highway was obstructed.

Held: First, that, upon these facts, the Court (being at liberty to draw inferences) could not infer that the right claimed had been exercised by the occupiers of the houses before any dedication of the highway to the public.

Secondly: that a highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of adjoining land for the purpose of depositing goods thereon.

Morant v. Chamberlin,

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HUSBAND AND WIFE.

Separation Deed—Construction of.

A deed of separation between husband and wife contained a covenant by the husband that he would not molest or disturb his wife in her person or manner of living, nor institute any suit to compel her to cohabit with him, &c., and a covenant by E. that the wife should not at any time thereafter "molest or disturb the husband," or require by any means whatsoever, either by Ecclesiastical censure or otherwise, or in any other manner endeavour to compel the plaintiff to cohabit with her, or to enforce any restitution of conjugal rights, &c.—*Held*, that a suit by the wife in the Divorce Court for a ju-

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debited H. and Co. with the premiums. On the 22nd the plaintiff sent an extract from the captain's letter to Lloyd's. The defendant, who was then for the first time informed of the fact that the ship had been ashore, wrote to H. and Co. as follows:—"Understanding that the ship "B." has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." This letter was not answered by H. and Co. The debit of H. and Co. in the books of the defendant remained until after the loss. On the 2nd April, the vessel was surveyed and reported to be perfectly tight and in a condition to undertake a voyage of any description. After several intermediate voyages she was totally lost on the 9th of October, 1857. *Held*, in the Exchequer Chamber: First, that there was no waiver of the objection to the policy by reason of the concealment of the information that the vessel had been ashore. Secondly, that there was no evidence of a new contract founded on the defendant's letter of the 22nd of January.

Semble, that the letter, even if answered by H. and Co., would not have amounted to a new contract. *Russell v. Thornton*, 140

(2). *Marine—Custom—Jettison.*

A custom that underwriters are not liable, under the ordinary form of policy, for general average in respect of the jettison of goods stowed on deck, is a valid custom and does not contradict the terms of the policy. *Miller v. Tetherington*, 278

(3). *Against Death by "Accident."*

H. effected with the defendants a policy of assurance, whereby they agreed that if he should sustain any injury caused by accident or violence, within the meaning of that policy and

the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the defendants should be subject and liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon H. went to Brighton by railway, having a ticket which entitled him to return by it on the following Monday. About seven o'clock on Monday evening he left his lodgings, having expressed his intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, and about six weeks afterwards a body was washed ashore on the Essex coast, which his brother and some acquaintances deposed at the inquest was his body, but the jury found that it was the body of a person unknown. — *Held*, in the Exchequer Chamber: First, that assuming H. died from drowning, that was a death by "accident" within the meaning of the policy. Secondly, that it was a question for the jury whether H. died from the action of the water or from natural causes. *Trew v. The Railway Passengers' Assurance Company*, 839

INTERROGATORIES.

Whether allowable when Answers may tend to Criminate.

See COMMON LAW PROCEDURE ACT, 1854 (3), (4).

JOINT STOCK COMPANY.

(1). *Subscribers of Memorandum of Association—Powers of as Directors.*

The defendants were a joint stock

Company, incorporated by the registration of a memorandum of association under the 19 & 20 Vict. c. 47, but no articles of association were executed. Before the first general meeting the subscribers of the memorandum of association, acting as directors of the Company, appointed one of their own number manager of the mine, at a salary of 350*l.* a year.—*Held*, that, under the provisions contained in Table B., the subscribers of the memorandum of association, as directors, had power to make the appointment, and that it was not illegal either at common law or otherwise. *Eales v. The Cumberland Black Lead Mine Company*, 481

(2). *Half Shares—Estoppel—Power to Sue for Calls made before Incorporation—Winding-up—Requisites of Calls by Liquidators.*

By the deed of settlement of a Joint Stock Company, it was provided that the capital of the Company should be 100,000*l.* in 1000 shares of 100*l.* each, and that it should be competent for any general meeting of the Company to create additional shares of 100*l.* each. The Company, at a general meeting, created 1500 new half shares of 50*l.* each, some of which the defendant purchased, executed the deed of settlement and received the dividends declared on the shares. It was afterwards resolved, at a special general meeting, that the Company be wound up under the Joint Stock Companies Acts, 1856, 1857, and the defendant was sued for calls made by the directors and the liquidators of the Company.—*Held*, that the defendant was estopped from denying that the 50*l.* shares were valid shares.

A Joint Stock Company, formed in 1837, and which had obtained an Act enabling the Company to sue and be sued in the name of one of

the members as a nominal plaintiff was afterwards registered and incorporated, pursuant to the Joint Stock Companies Acts, 1856, 1857.—*Held* that the incorporated Company could sue for calls made by the directors before the incorporation of the Company.

After an order for the voluntary winding-up of a Joint Stock Company, the liquidators appointed under the Joint Stock Companies Acts, 1856, 1857, may make calls with giving the notices prescribed by provisions of the deed of settlement or Acts, for calls made by the directors. *The Hull Flax and Cotton Mill Company v. Wellesley*,

(3). *Winding-up—Special General Meeting for.*

The deed of settlement of a Joint Stock Company, completely registered under the 7 & 8 Vict. c. contained a clause "that no business shall be transacted at a special general meeting than business for which it shall have been expressly called." The Company was afterwards registered under 19 & 20 Vict. c. 47. After passing of the 20 & 21 Vict. c. at a general meeting it was resolved that the Company should be wound up voluntarily, and liquidators were appointed. The meeting was in pursuance of a notice, which never did not state the intention of the Company to appoint liquidators at that meeting. In an action to recover calls made by the liquidators so appointed:—*Held*, that the clause applied to a meeting held for the purpose of appointing liquidators and that, no notice of the intention to appoint liquidators having been given, their appointment was invalid. *The Anglo-Californian Gold Mining Company v. Lewis*,

(4). *Winding-up Amendment Act—*
20 & 21 Vict. c. 78.

Where, upon the winding-up of a Joint Stock Bank, which was also adjudicated bankrupt, a contributory, against whom judgment had been signed on a scire facias, effected a compromise and obtained a certificate under the Joint Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78), the Court stayed all further proceedings on the judgment without imposing any terms. *Cleave v. Harwar*, 22

JUDGMENT.

See FOREIGN JUDGMENT.

Costs in Action on.

See COSTS (2).

JUSTICES.

Jurisdiction of.

See ASSAULT.

SERVANT (2).

LANDLORD AND TENANT.

(1). *Covenant not to sell Manure*
under Increased Rent.

Declaration, that the defendant covenanted with the plaintiff not to sell or carry away from the demised premises any manure, made &c. on the premises, without the consent of the plaintiff, under the increased rent of 10*l.* for every ton so given, sold or carried away; and further covenanted that he would pay all the increased rents. Breach: that defendant sold a large quantity of manure made on the premises, to wit 160 tons, and did allow the same to be carried away from the premises; and the plaintiff claims 2000*l.* Plea: that the defendant brought upon the premises a quantity of manure larger

and better in quality than that carried away.—*Held*, first, that the plea was bad; secondly, that the declaration was bad for not alleging that the increased rent was due or that it was unpaid. *Legh v. Lallie*, 165

(2). *Notice to Quit—Evidence of*
Time of Commencement of Tenancy.

In ejectment the plaintiff proved that S. was the tenant of the premises when he became the owner, and had paid rent to him for many years; that she quitted and was succeeded by H.; that N. succeeded H. and paid rent. In the beginning of September 1858, the defendant and N. severally called on the plaintiff and asked if he would accept the defendant as tenant. On each occasion the plaintiff said he would. On the 7th of September the defendant took possession, and in October of the same year paid the rent to Michaelmas 1858, for which the plaintiff gave a receipt as for rent due from N. The plaintiff received the rent at Christmas 1858, and gave a receipt for it to the defendant as for rent due from him. In March 1859, the plaintiff gave to the defendant notice to quit at Michaelmas or otherwise at the end of the year of the tenancy which should expire after the end of one half year from the time of his being served with that notice. On the 17th of December 1859, the plaintiff's agent served a notice on the defendant to quit at Midsummer. The defendant said the plaintiff might have the house if he paid the valuation of the fixtures and goodwill.—*Held*, that it was a question for the jury, and not for the Judge, to be determined by a consideration of all the facts, at what time the tenancy commenced; that there was evidence of a tenancy ending at

Michaelmas, and that it was a misdirection to withdraw from the jury all the facts, except the conduct of the defendant when the notice to quit at Midsummer was served on him. *Martin, B.*, dissentiente. *Walker v. Godè*, 594

(3). *Liability of Tenant holding over*
—*Double Value*—4 Geo. 3, c. 28.

A tenant holding over after the expiration of a notice to quit, is not liable to pay double value, under 4 Geo. 2, c. 28, s. 1, if such holding over is not wilful and contumacious, but bonâ fide and for his own protection. *Swinfen v. Bacon*, 184

B., who held lands as tenant from year to year under S., after the death of S. took the same with other lands at an increased rent from the devisee of S. The heir-at-law disputed the will. The devisee gave to B. notice to quit. B., acting under a bonâ fide belief that the heir-at-law was entitled, refused to give up possession of the land to the devisee,—*Held*, by the Court of Exchequer Chamber (affirming the decision of the Court of Exchequer), that B. was not liable to pay double rent under the 4 Geo. 3, c. 28, which applies only when the tenant holds over though conscious that he has no right to retain the possession. *Swinfen v. Bacon*. In error, 846

(4). *Evidence of Eviction—Of no sufficient Distress.*

In ejectment for a forfeiture, under the Common Law Procedure Act, 1852, s. 210, it appeared that the plaintiff sought to recover possession of two houses, numbered 13 and 14, which, in August, 1849, with two other houses, numbered 15

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LANDS CLAUSES CONSOLIDATION ACT, 1845.

8 & 9 Vict. c. 18, ss. 25, 34, 68.

The plaintiff, whose lands were injuriously affected by certain works of the defendants, who were acting under a statute with which the Lands Clauses Consolidation Act, 1845, was incorporated, on the 16th of December, 1858, gave notice under the 68th section of that Act that he claimed compensation in respect of such injury, and that unless the defendant paid the amount claimed within twenty-one days, he desired to have the amount of compensation settled by arbitration under that Act. Twenty-one days after this notice, the plaintiff, by writing under his hand, nominated a person as his arbitrator, and on the 17th of January, 1859, gave notice to the defendants that he had done so, and required the defendants to appoint an arbitrator on their part. On the 25th of January the defendants tendered to the plaintiff 30*l.* for the alleged damage and costs, which the plaintiff refused. The defendants then nominated an arbitrator on their part, and the sum of 23*l.* was ultimately awarded to the plaintiff as the amount of compensation to which he was entitled.—*Held*, that the plaintiff was not entitled to the costs of the arbitration by the 34th section of the 8 & 9 Vict. c. 18, the tender being in time, inasmuch as the plaintiff had not pursued the proper steps pointed out in the 25th section, and had not delivered his appointment to the arbitrator when the tender was made. *Yates v. The Mayor, &c. of Blackburn*, 61

LEASE.*Covenant not to sell Manure under Increased Rent.**See LANDLORD AND TENANT (1).***LICENSING ACTS.***See BEER.***LIMITATIONS, STATUTE OF.**3 & 4 W. 4, c. 42, s. 3—*Death of Defendant after Action brought.*

In May, 1831, the obligee of a bond brought an action against the obligor. After notice of trial the action abated by the death of the obligor in December 1835. The obligor left a will, which was not proved by the executor named therein. On the 18th of May, 1857, administration of the goods and effects of the obligor with the will annexed was granted to the present defendant. In March, 1852, the obligee petitioned the Insolvent Debtors Court, and his effects vested in the provisional assignee, the present plaintiff, who commenced an action on the bond against the defendant on the 17th of May, 1858.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the right of action was not barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 42, s. 3. *Sturgis, Provisional Assignee of Hartley, &c., v. Darell*, 120

LOCAL GOVERNMENT ACT, 1858.*Construction of Bye-laws made under.*

A bye-law made by a Local Board of Health, pursuant to the 21 & 22 Vict. c. 98, s. 34, directed that "every building to be erected and used as a

dwelling-house, shall have an open space exclusively belonging thereto to the extent at least of one-third of the entire area of the ground on which the said dwelling-house shall stand and which shall belong thereto &c." By the 21 & 22 Vict. c. 98, no bye-law shall affect any building erected before the date of the constitution of the district, but the re-erecting of any building pulled down to or below the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, shall be considered the erection of a new building.

The proprietor of a house, which had been erected before the constitution of the district, and was used for an hotel, having a yard with a coach-house and stables in the rear, for the purpose of making an addition to the hotel, pulled down the coach-house and stables below the ground floor, and erected upon the same site a building three stories high; the only means of access to the upper chambers being by going up the staircase of the old house and through a passage into the new building. On an information against the proprietor for an offence against the bye-law in not leaving an open space equal to one-third of the area of the ground on which the dwelling-house stood, &c., the justices found that the building erected in the yard being a new building built up to and adjoining the old building must either be considered with the old building as one house, or that the old house and new building must be considered as two erections, and that both old and new buildings must be considered in reckoning the ground upon which the building stands; and convicted him of a breach of the bye-law.—*Held*, that the conviction could not be sustained, because the new

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reside with an aunt for a long period, and no correspondence took place between the parties for a period of two years.—*Held*, that this was evidence from which the jury might infer that the plaintiff had exonerated the defendant from his promise before any breach. *Davis v. Bomford*, 245

want of such protection. *Holmes v. Clarke*, 849

See CONTRACTOR.
PLEADING (2).
SERVANT.

MEDICAL ACT.

21 & 22 Vict. c. 90.

MASTER AND SERVANT.

(1). *Liability of Master for Act of Servant done in the course of his Employment.*

The plaintiff, a passenger by an omnibus, while being forcibly removed from it by the guard in charge, was thrown on the ground and seriously injured. The proprietor of the omnibus, on being applied to for compensation, stated that the plaintiff was drunk and had refused to pay his fare. On cross-examination the plaintiff did not deny that he had been drinking.—*Held*, that if the guard intended to put the plaintiff safely out of the omnibus, there was evidence that in so doing he was executing the commands of the proprietor his master; and that if the injury was caused by the guard acting without due care in executing such command the proprietor was responsible. *Seymour v. Greenwood*, 359

(2). *Liability of Master for Accident to Servant—Risk knowingly incurred—Factory Acts.*

Where machinery is required by statute to be fenced, and a servant enters into the employment of the owner whilst it is protected, and continues in the service after the protection is removed by decay or otherwise, but complains of the danger and is promised, that the protection shall be restored, the master is liable for injury to the servant arising from the

K., who was legally qualified as a surgeon and apothecary, and registered as such under "The Medical Act," 21 & 22 Vict. c. 90, was, before the time of passing of that Act, possessed of a German medical diploma, and called himself Dr. K. He continued to use that description after the passing of the Act, though not registered as doctor of medicine. *Held*, no evidence that he had wilfully and falsely pretended to be, or taken or used the name and title of a doctor of medicine so as to render him liable to a penalty under the 40th section of that Act. *Ellis, Appellant, Kelly, Respondent*, 222

MINING.

Liability for Injury to adjacent Owner by Removal of Support—Damages.

Where the working of mines, in however careful a manner, has caused a subsidence of the adjacent land, the owner is entitled to recover in respect of damage to buildings thereon, although erected within twenty years, provided their weight did not contribute to the subsidence.

In 1833, a manufactory was erected on a close, and in 1841, and between that time and 1849, the buildings were enlarged. In March 1842, the close and buildings, which were leased for a term which expired in October, 1851, were conveyed in fee by S., the owner, to C. C. died in 1849, and in November 1851 the devisees under his will conveyed the

close and buildings to the plaintiff in fee, who before 1849 was assignee of the term and occupied the buildings. In 1849 and 1850 the defendants, in getting coal from their mines, near but not immediately adjoining the close, caused the surface to subside, by which the buildings were injured. The devisees of C. did not thereby, in fact, sustain any damage, inasmuch as they incurred no expense, and continued to receive the full rent for the premises, and upon the sale thereof obtained the full value, without reference to any injury thereto (of which they were ignorant) by the mining operations. Subsequently to the sale to the plaintiff, the working of the mines under lands, near to but not adjoining the close on which the buildings stood, occasioned a further subsidence. No damage was done by the working of the mines subsequently to July 1852, but the subsidence of the ground continued, the consequence of the previous mining operations. The mining was skilfully conducted, and the buildings did not contribute to the subsidence. In August, 1855, the plaintiff brought an action against the defendant.—*Held*, that he was entitled to recover damages in respect of the deterioration in value of the manufactory, the machinery broken, the increased expense of keeping it in repair and working order, and the diminished profits both in respect of his occupation before and after the purchase.

Held, also, that the devisees of C. might maintain an action for the injury to their reversion during the subsistence of the lease, as trustees and for the benefit of the vendee. *Stroyan v. Knowles. Hamer v. Knowles,* 454

MISTAKE.

Equitable Relief against.

To a declaration on a charter-party alleging as a breach the refusal of the defendants to load a cargo, the defendants pleaded, as an equitable defence, that they entered into charter-party solely as agents of A. D. and Co., and that, when the defendants signed the charter-party it was agreed and understood between the plaintiff and the defendants that the defendants were only to sign the charter as such agents, so as to bind A. D. and Co., and were not to make themselves liable as principals for the performance of the charter that they signed as follows:—"I, A. D. and Co., of Messina. H. & Co. agents:" the defendants and the plaintiff bona fide believing at the time the charter was made, that the defendants having so signed would not be liable to be sued on the charter, notwithstanding the charter in the body thereof professed to be made between the plaintiff as owner of the one part and the defendants as freighters on the other; that the defendants had the power to bind A. D. and Co., and that the plaintiff was inequitably taking advantage of the mistake in drawing the charter.—*Held*, that the plea shewed a good equitable answer to the action.—*As per Bramwell, B.—Semble*, that was a good answer at law. *Wake v. Harrop,* 7

MONEY HAD AND RECEIVED.

The plaintiff being in embarrassed circumstances, offered his creditor a composition of 5s. in the pound. The defendant, a creditor, refused to accept it unless the plaintiff paid him 50l. and gave him a bill of exchange for 108l. The other creditors would not accept the composition if the defendant did not. The plaintiff paid the defendant the 50l. and gave

NOTICE.

him the bill of exchange, and the defendant then executed the composition deed.—*Held*, that the plaintiff might recover back the money in an action for money had and received. Per *Pollock*, C. B., *Bramwell*, B., and *Wilde*, B. *Martin*, B., dissentiente. *Atkinson v. Denby*, 778

MONEY PAID.

See ARBITRATION.
BANKER.

NEGLIGENCE.

See ACTION ON THE CASE FOR NEGLIGENCE.
GAS COMPANY.

(2). *Liability of Waterworks Company for.*

See WATERWORKS COMPANY.

NOTICE.

Of Act of Bankruptcy.

See BANKRUPTCY (3).

Of Action.

The 3 & 4 Wm. 4, c. lxxiii., for paving, lighting, &c., the town of Birkenhead, by sect. 201 enacts that no plaintiff shall recover in any action, &c., to be commenced against the Commissioners for anything done or to be done in pursuance or under the authority of the Act, unless notice in writing shall have been given to the defendants. The Commissioners were sued for an injury occasioned by the negligence of some paviours, their servants.—*Held*, that they were entitled to notice of action, and that a notice detailing the facts, but not stating an intention to bring an action, was insufficient, *Mason v. The Birkenhead Improvement Commissioners*, 72

PLEADING.

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PARTICULARS.

See PRACTICE.

PARTNERSHIP.

Effect of Death of Partner on Contract.

See CONTRACT.

PENAL ACTION.

See PRACTICE.

PLEADING.

(1). *Certainty.*

A count of a declaration stated that the plaintiff was tenant to C. of a public house, and also owed her money; that C. had seized, as a distress for arrears of rent, certain goods of the plaintiff; and thereupon the defendant, representing and pretending that he was authorized by C. to act as her attorney in that behalf, and as such attorney to enter into the agreement thereinafter mentioned in her behalf, it was agreed between plaintiff and defendant, as such attorney on behalf of C., that for the consideration in the agreement mentioned, C. would withdraw the distress and take no proceedings for the recovery of the arrears of rent for six months. The declaration then stated that, although the plaintiff performed his part of the agreement, the defendant, representing and pretending that he was authorized as attorney for C. so to do, did, in the name of C., take proceedings for the residue of the arrears of rent within six months, and in violation of the agreement did, as such attorney in the name of C., distrain for the residue of the arrears of rent

the plaintiff's goods and chattels. By means whereof the plaintiff was not only prevented from carrying on his business as a publican, but lost divers gains and profits. That the plaintiff, trusting in the said representations of the defendant, and believing that the defendant was so authorized as aforesaid by C. to act, and that he did act as attorney on her behalf, as well as to enter into the said agreement, as to putting in the said distress in violation thereof, sued C. in an action of trespass, and at the trial the plaintiff was nonsuited by reason of the defendant not having been authorized by C., and by reason of the defendant, who was called as a witness on the trial by the plaintiff to prove the authority of C. to the defendant to put in the distress and to enter into the agreement on her behalf, denying any authority from C. to him, as her attorney, either to put in the distress or enter into the agreement on her behalf: Whereby, and by reason of the premises, the plaintiff expended and became liable to pay large sums of money for costs. On demurrer: — *Held*, that the count was bad for not distinctly averring that the defendant was not authorized by C. to act on her behalf. *Oxenham v. Smythe*, 690

(2). *Declaration—Statement of Duty as Contract.*

A declaration by the administratrix of J. R. alleged that J. R. was the servant of the defendants, on the terms that the defendants should take due and ordinary care not to expose the said J. R. to extraordinary danger and risk in the course of his said employment: yet the defendants did not take due and ordinary care not to expose, &c., and so carelessly conducted themselves that

J. R. was, while employed as such servant, exposed to extraordinary danger and risk in the course of his employment, and was, through the carelessness and wrongful conduct of the defendants, and by being exposed to extraordinary danger and risk as aforesaid, struck by a railway truck and killed. — *Held*, that no such contract could be implied from an ordinary contract of service. *Riley v. Admix., v. Baxendale*, 44

(3). *Plea "Never Indebted."*

To a declaration for calls by a railway Company incorporated by the Canadian legislature, setting out specifically and at length the Act empowering the Company to sue and the several facts shewing the liability of the defendant as a shareholder, the plea of "never indebted" may be pleaded; and the Court has no power to set aside such plea, on the ground that it tends to embarrass the plaintiff by putting him to an unnecessary, needless and expensive proof. *The Welland Railway Company v. Blake*, 410

(4). *"Not Guilty by Statute"—Reg Gen. T. T. 1853, r. 21.*

The defendant pleaded "not guilty by statute," and in the margin of the plea referred to several statutes. In addition, he relied at the trial on a section of one of the statutes not referred to, but no objection was taken. — *Held*, that the objection that this section was not mentioned in the margin of the plea, was not available on the argument of a rule to enter a nonsuit in pursuance of leave reserved. *Burridge v. Nicholls*, 383

(5). *Equitable Defence.*

See MISTAKE.

PRACTICE.

Suggestion that it should be tried, not by jury, but by Judge. Per *Martin, B., and Wilde, B. Wake v. Harrop,* 778

See LANDLORD AND TENANT (1).
PUBLIC COMPANY.

POOR.

A guardian of the poor who has knowingly supplied for his own profit goods for the use of the poor in the workhouse contrary to the provisions of the 4 & 5 Wm. 4, c. 51, and 55 Geo. 3, c. 137, s. 6, is liable to the penalty thereby imposed whether the master of the workhouse to whom he sold the goods was authorized to enter into such a contract or not. *Greenhow v. Parker,* 882

POSSESSION.

Presumption of Status Quo.

See FRAUDULENT CONVEYANCE.

PRACTICE.

(1). *Particulars — Under Plea of Payment into Court.*

In an action against a carrier, the declaration contained one count alleging the loss and damage of a variety of goods which the defendants undertook to carry for the plaintiff to numerous places at different times. The plaintiff having delivered particulars of his claim, and the defendants having pleaded payment into Court of a sum in satisfaction thereof, the Court ordered the defendants to deliver an account of the particular items of the plaintiff's demand in respect of which the money was paid into Court. *Bazendale v. The Great Western Railway Company,* 95

PUBLIC COMPANY. 921

(2). *Security for Costs.*

A plaintiff, captain of a foreign ship usually trading to this country, is liable to give security for costs. *Nylander v. Barnes,* 509

(3). *Trial—3 & 4 W. 4, c. 22—Penal Actions.*

The 3 & 4 W. 4, c. 42, s. 22, which empowers the Court or a Judge in any action the venue in which is by law local to order a suggestion to be entered that the trial may be had in another county applies to penal actions within the 31 Eliz. c. 5, s. 2. *Greenhow v. Parker,* 882

(4). *On moving for New Trial—Sheriff's Notes.*

On motion for a rule nisi for a new trial, in a case tried before the sheriff, under a writ of trial, the sheriff's notes must be produced, unless good cause be shewn to the contrary; and it is not a sufficient excuse for their non-production that the motion is made by the counsel who was engaged at the trial, and is prepared to state what occurred. *Killigrew v. Peters,* 688

See COMMON LAW PROCEDURE ACT, 1852.

COMMON LAW PROCEDURE ACT, 1854.

COSTS.

PRINCIPAL AND AGENT.

See AGENT.
BANKER.
CONTRACTOR.

PRIVILEGE FROM ARREST.

See BANKRUPTCY (4).

PUBLIC COMPANY.

(1). *Calls in Excess of those authorized—Void Calls.*

An Act incorporating a railway Company provided that no call of money from the shareholders should exceed ten per cent. on the amount of their shares: also, that the directors might, from time to time, make such calls as they should deem necessary: Provided that thirty days' notice be given of such call, and that no call exceed the prescribed amount, nor made at a less interval than two months from the previous call, or a greater amount be called in, in any one year, than the prescribed amount. In an action for a call, the defendant pleaded that the directors made more calls and to a greater amount than were prescribed by the Act, and that the said call was made in excess of the calls by the Act empowered to be made. Replication: That the calls in the plea mentioned, other than the call sued for, were not authorized by the Act, and were therefore void; and that the call sued for was not a call made in excess of the calls by the Act empowered to be made, if the void calls are not reckoned as calls by the Act empowered to be made: and that the defendant did not pay the void calls, or any part thereof.—*Held*, on demurrer, that the replication was bad, since it did not shew that the directors had declared the calls void; and, consistently with it, they might have received the greater part of the money called for. *The Welland Railway Company v. Berrie*, 416

(2). *Debt for Calls—Plea.*

See PLEADING.

PUBLIC HEALTH ACTS.

See LOCAL GOVERNMENT ACT, 1858.

RAILWAY COMPANY.

Charge for Receiving, Loading, &c.

A railway Company were required,

by their special Act, to carry as common carriers for hire, and to afford to all persons, conveying or sending goods upon their railway ever reasonable convenience and facilities for loading and unloading goods. The Act also authorized the Company, for carriage of goods, to demand a toll not exceeding three pence per ton per mile.—*Held*, that the Company were not entitled to charge an additional sum for service performed, accommodation afforded, and expense and risk incurred in and about the receiving, loading, unloading and delivering the goods. *Pegler v. The Monmouthshire Railway, &c., Company*, 64

(2). *Liability of, for Act of Contractor.*

See CONTRACTOR.

See also CARRIER.

RELEASE.

(1). *Operation of—According to Intent of Parties.*

Though a release is general in its terms, the Court will limit its operation to matters contemplated by the parties at the time of its execution.

Trover for indigo warrants. Plea that the plaintiffs by deed release the defendants from the causes of action. Replication, on equitable grounds, setting out a deed for the liquidation of the affairs of the defendants under inspectorship, and by which the plaintiffs, who were creditors of the defendants, released them "from all and all manner of actions, cause of action and suits, bills, bonds, writings, obligations, debts, &c., claims and demands whatsoever both at law and in equity, or otherwise howsoever." Averments that at the time the plaintiffs executed the release they did not know that they had any claim against the

defendants in respect of the said warrants, and that the plaintiffs executed the deed intending thereby only to release the debt due from the defendants to them. Rejoinder: that the plaintiffs employed the defendants to purchase goods and obtain advances for them, and that there were cross-claims against each other constituting matters of account: that the defendants had authority from the plaintiffs to deposit, as a security for the repayment of advances, the warrants of goods purchased for them, to an amount sufficient to cover the liabilities of the defendants for the plaintiffs: that whilst the said warrants were so deposited, the defendants suspended payment and the parties who held the warrants sold the goods represented thereby: that at the time of the making of the said deed the state of accounts between the plaintiffs and defendants was not ascertained, and whether the defendants had exceeded their authority in depositing the warrants was wholly unknown to the defendants and the plaintiffs: that the release was given in consideration of the execution of the same by other creditors, the consideration for whose execution was the execution by the plaintiffs: that the other creditors supposed that the release was intended to include all claims which the plaintiffs, upon ascertaining the accounts, might have against the defendants. On demurrer to the rejoinder: *Held*, that the replication was good and the rejoinder bad. *Lyall v. Edwards*, 337

(2). *When Implied.*

See ESTOPPEL.

SALE OF GOODS.

(1). *Statute of Frauds, s. 17—Signature by Factor.*

The defendant having negotiated with the plaintiff, a hop-grower, for the purchase, by sample, of some hops, went with him to his factor, when the defendant agreed to buy the hops, and in the presence of both parties, the factor wrote out bought and sold notes, the former of which contained the name of the defendant, and was delivered by the factor to him. The date of the notes was altered by the factor, at the request of the defendant, in order to give him further time for payment. The hops were afterwards weighed in the presence of the plaintiff and defendant, when a dispute arose as to their weight and condition, and the defendant refused to accept them. *Held*, that the factor was not the agent of the defendant to bind him by signing his name to the contract, and therefore there was no sufficient memorandum or note in writing within the 17th section of the Statute of Frauds. *Darrell v. Evans*, 660

(2). *Statute of Frauds, s. 17—Evidence of—"Acceptance and Receipt."*

The plaintiffs, wine and spirit merchants, kept a bonded warehouse, where they took in other persons' goods as well as their own, charging warehouse rent. Of this warehouse the plaintiffs had one key and the custom house officer another. The defendant agreed to buy of the plaintiffs two puncheons of rum which were to remain in bond till wanted, the defendant to have six months further credit. The plaintiffs sent to the defendant an invoice describing the puncheons by marks and numbers with the words "free six months," which was explained to mean that they might remain in the plaintiffs' warehouse without charge for six months. The plaintiffs entered in the rum book of their ware-

house the puncheons of rum as sold to the defendant, and proved that after this entry they had no power to get the goods out. The rum remained in the warehouse for two years, during which time the defendant on several occasions asked the plaintiffs to take back the goods or buy them of him.—*Held*, by the Court of Exchequer Chamber (reversing the decision of the Court of Exchequer), that there was evidence to go to the jury that the character in which the plaintiffs held the goods was changed: and that, if they held as warehousemen for the defendant, there was evidence of an acceptance and receipt of the goods by the defendant so as to satisfy the 17th section of the Statute of Frauds. *Castle v. Swoorder*, 828

See COUNTY COURT (1).

SEISIN.

Evidence of.

See FRAUDULENT CONVEYANCE.

SERVANT.

- (1). *Conviction for Absenting Himself from Service*—4 Geo. 4, c. 34—*Contract of Service.*

By agreement in writing the appellant agreed to serve the respondents, potters, as a biscuit-oven placer, at daily wages, for twelve months. By another agreement of the same date B. agreed to serve the respondents for the same period as biscuit-oven fireman, to be paid by piece work, he paying the appellant wages out of what he earned.—*Held*, that the relation of master and servant subsisted between the respondents and the appellant, notwithstanding his wages were paid by B., and consequently he was properly convicted under the 4 Geo. 3, c. 34, for absent-

ing himself from the respondee service. *Willett, Appellant, B. Resp.*

- (2). 6 Geo. 3, c. 25, s. 4—*See Conviction for unlawfully Absenting from Service—Bond Fide Elicie of Supposed Right.*

By memorandum in writing agreed to serve M. as a cutler three years, and M. agreed to employ him and pay him for his work according to a schedule of prices. Having quitted his service during the term, he was convicted under 4 Geo. 4, c. 34, and imprisoned twenty-one days, for unlawfully sending himself from his service. After his discharge from prison did not return to the service of but went and worked elsewhere. a second information laid against him for unlawfully absenting himself from the service, it was proved to satisfaction of the justices that the first occasion he absented himself on account of a difference with his master as to the scale of prices that when, after his discharge from prison, he refused to return, he advised by his attorney that he was not bound to do so; and the justices stated that they thought it very probable that he bona fide believed what his attorney told him. The justices convicted him under the 6 Geo. 3, c. 25, for unlawfully absenting himself and sentenced him to one month imprisonment. On a case stated the justices under the 20 & 21 V. c. 43:—*Held*, that the conviction could not be sustained.

Per *Pollock*, C. B., and *Brampton*, B., dubitante *Martin*, B., because the defendant in refusing to return appeared to have been acting bona fide in the exercise of a supposed right.

Per *Pollock*, C. B., and *Martin*,

B., dubitante *Bramwell*, B., because the provisions of the 6 Geo. 3, c. 25, s. 4, relating to this matter, are repealed or superseded by the 4 Geo. 4, c. 34.

Per *Pollock*, C. B., and *Martin*, B., dissentiente *Bramwell*, B., because the defendant having been once convicted for a departure with intent to leave his service altogether, could not be convicted a second time under the 6 Geo. 3, c. 25, s. 4. *Regina v. Youle*, 753

SHERIFF.

(1). *Liability for Sale of Goods Under Execution against Bailees.*

Declaration, that plaintiffs having bailed and let to P. divers waggons for a certain term, and being entitled to and the owners of the waggons subject to the interest of P., thereupon, during the said term and while the plaintiffs and P. were so interested, the defendant converted the same to his own use and sold the same, whereby the plaintiffs were injured in their title to the waggons, and the same became lost to the plaintiffs.

Pleas:—Fourthly, that the defendant sold, but not in market overt, the waggons as sheriff in the execution of a writ of fi. fa., and that at the time of the sale the defendant had not any notice of the plaintiffs' interest in the waggons.—Demurrer.

Fifthly, that the defendant seized and sold the waggons, not maliciously, and not in market overt, as sheriff, &c.; and that the plaintiffs had not sustained and will not sustain any damage.

New assignment to both pleas.—That defendant converted the waggons by absolutely selling the plaintiffs' interest and delivering the waggons to divers persons in pursuance of the sale, and thereby causing the same to be used by the said per-

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sons and worn by such user, &c.—Demurrer.

Held:—First, that the fourth plea was good; but secondly, that the plaintiffs were entitled to judgment on the new assignment. *The Lancashire Waggon Company (Limited) v. Fitzhugh*, 502

(2). *Arrest of Party privileged.*

See BANKRUPTCY (4).

SHIPPING.

(1). *Ship's Husband—Evidence of Appointment—Authority of—Effect of Revocation.*

The plaintiff, part owner of a ship, and who acted as ship's husband, being authorized by the other part owners (of whom the defendant was one), to repair and lengthen the ship, gave verbal orders for the repairs, and entered into a written contract with a ship builder for lengthening the ship. Afterwards the plaintiff received a notice from the defendant that he would not be answerable for any alterations in the ship. The work was completed and the plaintiff paid for it, and on telling the defendant the amount, he said that "the ship had better have been sold." The plaintiff having sued the defendant for his proportion of the money paid:

Held:—First, that the fact of the plaintiff having acted as ship's husband was sufficient evidence of his appointment, without any formal proof.

Secondly, that the authority to make the alterations could not be revoked after it was acted on, and that it was for the defendant to prove that his notice was given before the work was commenced.

Thirdly, that the plaintiff need not produce the written contract, since the work was done, the money paid

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under it, and the defendant, on being told the amount, did not deny his liability. *Chappell v. Bray*, 145

(2). *Freight—Effect of Indorsement of Bill of Lading to Charterer.*

The defendant shipped at Liverpool on board the plaintiff's vessel certain goods, and the master signed a bill of lading which stated that the goods were shipped by the defendant "as agent," and were to be delivered at the port of Colombo "unto order or assigns, he or they paying freight for the goods." Before the shipment, the plaintiffs advanced to E., on whose account the goods were shipped, 400*l.*, upon an undertaking by E. that he would indorse to them as a security a bill of lading of the goods, wherein the freight should be payable by E. in this country. The defendant indorsed the bill of lading to E., who indorsed it to the plaintiffs as a security for the said advance and a further advance made upon an estimate between the plaintiffs and E. of the value of the goods freight free. E. not having paid the freight:—*Held*, First, that the defendant was liable under the bill of lading to pay the freight to the plaintiffs.

Secondly, that the 18 & 19 Vict. c. 111, did not vest the property in the goods in the plaintiffs, as indorsees of the bill of lading, so as to deprive them of their right to sue the defendant for the freight. *Fox v. Nott*, 630

SURGEON.

See MEDICAL ACT.

STAMP.

Effect of Absence of.

See EVIDENCE (2).

WATERWORKS.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STAYING PROCEEDINGS.

See JOINT STOCK COMPANY (4).

TENDER.

See LANDS CLAUSES CONSOLIDATION ACT.

TRESPASS.

Against Treasurer of County Court for breaking open Office used for County Court purposes.

See COUNTY COURT (2).

VOLUNTARY CONVEYANCE.

See CONVEYANCE, FRAUDULENT.

WARRANT.

See COMMITMENT.

WATERWORKS.

Liability for not keeping Plugs in Repair.

By the 8 & 9 Vict. c. cxxxv., s. 53, the Wolverhampton Waterworks Company, at the request of the Commissioners under an Act for improving the town, were required to fix proper fire plugs in the main and other pipes belonging to the Company. By the 54th section, "the Company shall, at the cost and charges of the said Commissioners, from time to time, repair, renew and keep in proper order every such fire plug." By the 55th section, "the costs of fixing, placing and maintaining the same in repair shall be

defrayed by the Commissioners." The Company having put down plugs in the streets the Commissioners paid for them; and by the 54 Geo. 3, c. cvi., and subsequent Acts, the plugs became the property of the Local Board of Health. A horse was injured by getting its foot into one of the plugs, the cap of which was broken.—*Held*, that the Company and not the local Board was liable to an action for the neglect to repair. *Bayley v. The Wolverhampton Waterworks Company*, 241

(2). *Liability of Undertakers for Diverting Water contrary to Act — Measure of Damages.*

By the "Manchester Corporation Waterworks Act, 1847," subject to the restrictions and provisions in that Act contained, the corporation were empowered to construct a reservoir and intercept the waters of the river Etherow for the purposes of the Act. By section 45, they were not to divert the water of the Etherow until a reservoir should be completed and filled with water. By section 46, they were required to discharge out of the said reservoir sixty cubic feet per second for twelve hours of every working day. By the "Manchester Corporation Waterworks Amendment Act, 1848," sect. 12, in lieu of sixty cubic feet, seventy-five cubic feet per second were to be discharged. By section 15, in case of any failure, neglect or default by or in consequence of which the quantity of water required by that Act to flow or be discharged over the guage should not so flow, the corporation were to forfeit 50*l.*, by way of penalty, to the occupiers of certain mills. And by section 17, it was enacted that it should not be

lawful for the corporation to use or appropriate any water flowing to the river Etherow until they should have secured and commenced to discharge the stipulated quantity of seventy-five feet per second.

The corporation made a reservoir which from engineering difficulties was never completed, as required by the Act of 1847, or with the additions imposed by the Act of 1848, so as to be filled with water or capable of being filled with water; and water had not been discharged therefrom in the quantity and manner required by the Acts, or in any larger quantity; but in 1857 they diverted the water of the Etherow for the supply of the inhabitants within the limits of the Acts, and since that time have discharged certain quantities of water from the reservoir during twelve hours of every day.

In 1860 the plaintiff, a millowner on the Etherow, brought an action against the corporation. The declaration contained counts for wrongfully diverting the waters of the Etherow, and also counts for not discharging a quantity of water equal to seventy-five cubic feet per second for twelve hours of every working day. The defendants paid money into Court as to the former counts, and to the latter pleaded that they had not completed the reservoir and works mentioned in the Act, so as to make it their duty to discharge water at the rate specified.—*Held*, that the plea was good; that the defendants were not estopped from setting up the non-completion of the reservoir, and that the plaintiffs were only entitled to damages for the loss of the natural flow of the waters of the Etherow, and not for the non-discharge from the reservoir of the seventy-five cubic feet per second. *Waller v. The Mayor, &c. of Manchester*, 667

WILL.

(1) *Construction of—with reference to Date of Will.*

In April 1854 a testator devised as follows:—"I give and devise all that my messuage or dwelling-house with the buildings and lands belonging thereto *now occupied by me*, situate at W. (containing about twenty acres), together with the close of land called the Hall Close (containing about fourteen acres and a half), *now occupied by E. W. as tenant thereof*, and also the three cottages and garden cottage at W. aforesaid, except as to the cottage now occupied by my servant F. B., being one of the above three cottages) with the orchard and piece of ground behind and adjoining thereto, containing about one acre and a half, which I hereby give and devise to the said F. B. and to S. his wife successively during their lives after the decease of my wife M. H., and subject to such estates for life, unto and to the issue of my said wife, her heirs and assigns for ever." Previous to the year 1847 a close, called "Townend Close," consisting of about six acres, formed part of a farm belonging to the testator at W. In the year 1847 a railway was commenced, which was completed before the will was made, and which divided the Townend Close, separating a part containing 2 a. 0 r. 26 p. (which was claimed in this action, and another piece called "The Potato Patch," containing 2 r. 35 p. from the remainder of the old Townend Close. After the formation of the railway, and before the making of the will, the testator took the Potato Patch into his own occupation, and continued to hold it until his death in June, 1856. In the Spring of 1856 he took the close in question into his occupation, and continued to hold it until his death,

but up to this time it had been occupied by a tenant with the rest of the farm.—*Held*: First, that the word "*now*" had reference to the date of the will, and that the Townend Close in question would not pass under independently of the 7 Wm. 4 & 1 Vict. c. 26.

Secondly, that there was a manifest intention that the will should not speak and take effect from the death of the testator, and consequently the close in question did not pass under the 20th section of the 7 Wm. 4 & 1 Vict. c. 26. *Hutchinson v. Barrow*, 58

(2). *Construction of devise.*

A testator devised as follows:—"As to my real estate if my daughter dies before she arrives at lawful age or have no lawful issue, then I leave my real property to my brother J. and D. H. equal between them, & But in ~~case~~ my daughter ~~shall~~ have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs, assigns and executors for ever." The daughter having attained twenty-one, married and settled the property in question on her husband, but died without ever having had a child.—*Held*, that on attaining twenty-one she took an estate in fee by descent, and that therefore the devise to J. and D. H. never took effect: *Per Pollock, C. E. Bramwell, B., and Channell, B., dissentiente Martin, B. Johnson Simcock and Jackson*,

WINDING UP.

See JOINT STOCK COMPANY (2), (3) (4).

WORK AND LABOUR.

Evidence of Contract.

See BUILDING SOCIETY.

THE END.





